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## Giving the Audience What It Wants

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Economics-minded critics of government intervention in the media realm raise a constant refrain. Interventions are paternalistic. Interventions treat viewers as "helpless or obstinate."<sup>1</sup> Interventions assume that viewers are "incapable of wise choice."<sup>2</sup> In a free society, audiences must be treated as perfectly able to know and choose what they want to read, watch, and listen to. Market-based incentives will lead media producers to provide audiences with what they want. In his classic article arguing for deregulation of broadcasting, former FCC Chairman Mark Fowler explained that the government "should rely on the broadcasters' ability to determine the wants of their audiences through the normal mechanisms of the marketplace."<sup>3</sup> As with any other product, "[i]n the fully deregulated marketplace, the highest bidder would make the best and highest use of the resource."<sup>4</sup> Fowler's deregulatory perspective has swept through policymaking circles and become the received wisdom in executive, legislative, and judicial branch thinking about media policy.<sup>5</sup> This Article argues that this approach is fundamentally wrong.

The Article's primary concern is with the market's effectiveness in creating and providing media content. The pervasive antiregulatory refrain, however, has recently been equally loud in the related context of the infrastructure for delivering communication content.<sup>6</sup> It was overwhelmingly evident in passage of the *Telecommunications Act of 1996*, adopted as "[a]n Act to promote competition and reduce regulation."<sup>7</sup> The virtually unquestioned market orientation was conspicuous, for example, in the bill's initial Senate Report, which described the bill's purpose as "to provide a pro-competitive,

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<sup>1</sup> See Thomas G. Krattenmaker & L.A. Powe, Jr., *Converging First Amendment Principles for Converging Communications Media*, 104 YALE L.J. 1719, 1725 (1995).

<sup>2</sup> See *id.*

<sup>3</sup> Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 210 (1982).

<sup>4</sup> *Id.* at 211.

<sup>5</sup> See, e.g., *Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996); *Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909 (E.D. Va. 1993), *vacated and remanded to determine if moot*, 116 S. Ct. 1036 (1996); U.S. DEP'T OF COMMERCE, *GLOBALIZATION OF THE MASS MEDIA* (1993).

<sup>6</sup> Cf. BRUCE M. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION* 189 (1975) (emphasizing the propriety of government regulation of the transmission system but not the structurally distinguishable editorial or content creation system). Although I have elsewhere criticized some of the "deregulatory" tactics of the new *Telecommunications Bill*, see C. Edwin Baker, *Merging Phone and Cable*, 17 HASTINGS COMM. & ENT. L.J. 97, 116-17 (1994), this Article challenges the more fundamental premises that underlie both that bill and, possibly more importantly, the country's overall media policies.

<sup>7</sup> Pub. L. No. 104-104, 110 Stat. 56 (1996).

deregulatory national policy framework.”<sup>8</sup> Senator Hollings’ additional views emphasized that “competition is the best regulator of the marketplace,”<sup>9</sup> while the only two dissenting Senators argued that “[d]eregulation has a clear and consistent track record” but complained that the deregulatory bill (as reported out) did “not go far enough” and did “not guarantee free and open markets.”<sup>10</sup>

The promarket refrain within the media realm often repeats standard conservative defenses of free markets. Yet, in the context of the media, this view has added appeal, even to generally proregulatory liberals, because of First Amendment values that reject government paternalism in respect to speech. Despite the lure of this equation of freedom of the press with free markets, I have argued the equation is not mandated by constitutional law.<sup>11</sup> Although the First Amendment ought to restrict purposeful suppression of speech, it should not and has not restricted structural interventions designed to improve the quality of the press.

Still, maybe the critics of intervention properly emphasize the strong antipaternalism aspect of the First Amendment. If interventions are paternalistic, if they attempt to displace people’s own choices of what they want, then maybe interventions are contrary to basic First Amendment values. The critics argue that, in respect to media content, surely the government ought to let the public get what it wants—and this, they assert, means leaving the issue to the market.<sup>12</sup> This Article critiques the underlying assumption of this argument, namely, the claim that the market gives people the media they want.

Economically-oriented critics of intervention typically rely on oversimplified economics. Under certain purportedly typical circumstances, markets produce a preference-maximizing amount of a “product.” The market provides firms with an incentive to produce the product as long as the product’s cost (e.g., its cost of production, distribution) is less than the purchaser will

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<sup>8</sup> COMMITTEE ON COMMERCE, SCIENCE, & TRANSP., 104TH CONG., REPORT ON TELECOMMUNICATIONS COMPETITION AND DEREGULATION ACT OF 1995, S. REP. NO. 104-23, at 1 (1995).

<sup>9</sup> *Id.* at 67.

<sup>10</sup> *Id.* at 70.

<sup>11</sup> Elsewhere I have discussed interpretations of the Press Clause as well as some of the history of government intervention and will not explore those issues in this Article. *See, e.g.*, C. EDWIN BAKER, *ADVERTISING AND A DEMOCRATIC PRESS* ch. 5 (1994) [hereinafter BAKER, *ADVERTISING*]; C. Edwin Baker, *Private Power, the Press, and the Constitution*, 10 CONST. COMMENTARY 421 (1993) [hereinafter Baker, *Private Power*]; C. Edwin Baker, *Turner Broadcasting: Content Regulation of Persons and Presses*, 1994 SUP. CT. REV. 57 [hereinafter Baker, *Turner Broadcasting*]; *see also* CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993).

<sup>12</sup> *See* Fowler & Brenner, *supra* note 3.

pay, that is, as long as marginal costs are less than marginal price. This I call the "standard model."

Of course, no one ever claims that the market works perfectly. And the standard model is subject to a host of general critiques.<sup>13</sup> Still, many find the standard model relatively adequate, at least enough so that it seems persuasive as a presumptive reason to rely on "free" markets. For present purposes, I will assume that the market generally works relatively well—for example, it effectively and efficiently leads to the right production and distribution of cars or can openers. My claim is that, whatever the validity of general critiques of the market, the standard model applies especially badly to media products.

The persuasiveness of the standard model depends on the following assumptions: (1) the products are sold in competitive markets and they are sold at a price (*i.e.*, marginal revenue) where average cost equals marginal cost (and thus, implicitly, where marginal cost is rising); (2) the product's production and normal use creates relatively few serious externalities (*i.e.*, relatively few major benefits not captured by or costs not imposed on the seller/producer); and (3) the most significant policy concern is satisfying market-expressed preferences. Even if these assumptions are true enough in respect to cars or can openers, my claim is that they do not apply so well to the media.

I begin in Part I by noting several special qualities of most media products, which complicate the economic analysis. Then, the argument proceeds in three parts. Parts II and III survey reasons why media markets are especially unlikely

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<sup>13</sup> For example, (1) reliance on market allocation accepts the existing distribution of wealth as a given when it should be changed or is contested; (2) the market stimulates undesirable desires precisely because they can be profitably fulfilled; (3) the market encourages (rewards) undesirable interpersonal behavior and undesirable personality traits; (4) market competition creates an incentive for a market enterprise (*e.g.*, capital holders) to have power in relation to other resource owners (*e.g.*, labor or other competitors) as much as it creates an incentive to produce good products efficiently although the power struggles between stake-holders both waste resources and often generate unjust distributions, *see, e.g.*, RICHARD C. EDWARDS, *CONTESTED TERRAIN: THE TRANSFORMATION OF THE WORKPLACE IN THE TWENTIETH CENTURY* (1979); and (5) the market promotes optimal preference satisfaction only if, contrary to reality, most goods are made available at their marginal cost—since this is not the case, we live in a world of the "second best" where making any particular item available at its actual marginal cost could amount to too low or too high a price and could generate too much or too little production, depending on whether the item substitutes for (or otherwise affects the demand for) items that are made and sold at less than or more than their "real cost."

Acceptance of these general arguments encourages a much more modest policymaking role for traditional economic analysis and especially for the standard model described above. Micro-economic reasoning will often be relevant to various entities' or individuals' profit concerns, but much less relevant to societal well-being.

to lead to the "highest and best" uses of resources as defined by the economic criteria of value: "willingness and ability to pay." More pointedly, media markets can be expected not to provide audiences with "what they want" in any economically relevant sense of that notion. Staying within the framework of economic analysis, Part II explores problems inherent in media markets related to the fact that, unlike cars and can openers, once media content is created, the content can be "consumed" by anyone without reducing its availability to others. Still accepting the economic framework, Part III takes into account so-called externalities—media's positive and negative effects on "third parties," people other than the media's immediate audience—that undermine the normal expectation that markets will be value maximizing. Then, Part IV moves away from traditional economic analyses by questioning the propriety of subjecting all social value to market analysis; it argues that the market's identification of preferences and its reliance on the existing distribution of wealth are often inappropriate for determining the production and distribution of media content. Each section provides reasons to reject sole reliance on the market in the media context. Finally, Part V summarizes the policy lessons suggested by the earlier sections.

## I. THE SPECIAL NATURE OF MEDIA PRODUCTS

Media products are unlike the hypothesized "typical" product, such as a car or can opener, in four ways that are relevant here. Each difference complicates any economic claim concerning the wisdom of reliance on markets. As background for further exploration, this Part will outline these characteristics of media products.

First, media products have significant "public good" aspects. A public good is an item for which one person's use of the product or gain from the product does not affect its use by or benefit to another person.<sup>14</sup> National

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<sup>14</sup> Economic definitions of "public good" usually emphasize two aspects: "nonrivalrous use," which is the quality I emphasize above and is a major factor in the analysis offered in Part II, and "nonexcludibility." Although my discussion makes little direct use of the concept of nonexcludibility, in a sense it is applicable to the (positive) externalities that are taken up in Part III. In common usage, however, nonexcludibility as an aspect of a public good is usually thought of as referring to situations where any purchaser and each nonexcluded beneficiary get roughly the same type of benefit from the good, while the concept of externalities is most commonly used where the benefit or burden on nonexcluded third parties is of a different sort than that which enticed an individual purchase. I thank Jason Johnson for pointing out these different elements.

defense or public parks<sup>15</sup> are goods that many can use once the good is provided. Typically, utilities or other “natural” monopolies exhibit this public good quality in their infrastructure, which multiple consumers can use with no or very small extra expense. To the extent that this infrastructure—gas lines, water mains, or telephone lines—is a major part of the delivered product’s cost, and to the extent that adding an additional customer does not increase the cost of this infrastructure, which is usually true until crowding requires larger lines or mains, the marginal cost of serving that additional consumer will be substantially less than the average cost. That is, the marginal cost of supplying the new user could approach zero while the average cost of the infrastructure to each user, that is, its total cost divided by the number of users, stays much higher.

This situation leads to a problem. If the product is priced at its average cost (or higher if a seller exercises monopoly power), some consumers will not be willing (or able) to pay that price even though they want the products and would be willing to pay the added cost created by their usage. Thus, charging the average cost results in underproduction of goods and under-utilization of goods that are produced. On the other hand, the product cannot be priced at the marginal cost, as efficiency considerations normally recommend, because the revenue that it produces (selling price times the number of purchasers) would not cover the product’s cost. The market will not produce the product if all specimens are sold at the marginal cost of the last specimen because the seller would not recover the cost of the required infrastructure.

The media spend huge amounts to gather, write, and edit news or to create and produce video entertainment—costs known as “first copy costs.” This economically significant element of media products’ cost is like the utility’s infrastructure or better, like national defense, because there is no limit to how many can benefit from the producer’s expenditure.<sup>16</sup> Adding a marginal

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<sup>15</sup> Although these are typical examples, the point is somewhat overstated. Many goods seem like public goods only within limits. For example, more users eventually interfere with the quality of the park—the crowd begins detracting from others’ enjoyment or otherwise imposes marginal costs, like extra clean-up or wear-and-tear costs. Still, once goods like defense of national borders or media content are produced, they can be consumed by multiple people without significant increased costs.

<sup>16</sup> Economists often identify this factor as the cause of the current dominance of one-newspaper towns. A monopoly newspaper pays only one set of first copy costs (and requires a single infrastructure) in serving the whole city. By adding customers, it constantly reduces its average cost. See JAMES N. ROSSE & JAMES N. DERTOUZOS, *ECONOMIC ISSUES IN MASS COMMUNICATION INDUSTRIES* 55–78 (1978). Competition can be expected only as an unstable equilibrium, usually between two papers roughly equal in circulation. See Randolph E. Bucklin et al., *Games of Survival in the US Newspaper Industry*, 21 *APPLIED ECON.* 631, 636

consumer does not affect first copy costs or analogous costs such as the expense of broadcasting. Writing the story or sending out the broadcast signal costs the same no matter how many people "tune-in." As long as these public good costs are a large enough part of the media's total cost,<sup>17</sup> charging potential purchasers the average cost leads to inefficient exclusions. Charging the average cost excludes people even though they would pay more for the story or broadcast than it costs to add them to the group that receives it. Alternatively, setting the price of a good at the marginal cost, that is, the cost of supplying it to the last purchaser, creates insufficient incentives to produce the good. Of course, firms sometimes avoid these consequences by engaging in "price discrimination"—charging different purchasers different prices and thereby tapping the "consumer surplus" that some consumers would receive if charged only the marginal costs. Whether opportunities for price discrimination are sufficiently available to produce what the standard model would describe as a value-maximizing level of production (hopefully without producing monopoly

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(1989) (stating that newspapers' reliance on advertising increases the instability of any equilibrium).

Of course, until a long-term decline began just before the end of the nineteenth century, local daily newspapers were very competitive. Thus, Rosse more precisely suggests that the "fundamental long-run cause of newspaper failure is loss of effective market segmentation." James E. Rosse, *The Decline of Direct Newspaper Competition*, 30 J. OF COMM., Spring 1980, at 65, 67. Although Rosse does not explain this loss, the decline in effective segmentation could result from the changed incentives that occur when advertisers become the primary purchaser of newspapers' efforts. To the extent that newspapers' primary product becomes readers sold to advertisers rather than product sold to readers, the primary predictable product differentiation for daily newspapers selling to local advertisers will be geographical rather than content based. See BAKER, ADVERTISING, *supra* note 11, ch. 1.

<sup>17</sup> The claim here is that this public good element in media products is sufficiently large and, importantly, sufficiently variable among media products that economic and policy analyses ought to take it explicitly into account. The difference here between media products and other goods is at most a matter of degree. Virtually all mass-produced products include what I here call a "public good" element—most obviously, the design cost. This always creates some tension in the standard competitive market model I described. The market encourages enough (or too much) research on practices or product design only to the extent that the research is aimed at creating products over which the researcher will have something approaching monopoly power—for example, if it obtains a patent or trade secret. This helps explain, for example, why the market encourages research expenditures on drug therapies *even if* the marginal improvement of health, say the marginal reduction of death from cancer or heart disease, would be much greater from research dollars spent on nonpatentable "public health" or environmental health methods (although this is only one of the causes of the skewing of research expenditures).



profits) is an empirical matter that will vary with the product and market in question.<sup>18</sup>

Second, the type and size of both positive and negative externalities are extraordinarily significant in respect to media products. People care whether their reputation is ruined or advanced, whether people they meet are boring or cultured, and whether the person they pass on the street decides to rape or murder them—and these are among the phenomenon that can be significantly affected by *other people's* media consumption. Likewise, many people value a well-functioning democracy and hence are greatly benefited by other people's consumption of quality media or harmed by the ignorance or apathy produced by inadequate consumption or consumption of misleading, distortive, and demobilizing media. Furthermore, the corruption that an effective investigative press deters is a benefit that the media cannot capture to sell to consumers. Later I will suggest that many media policies, ranging from libel laws to reporters' privileges to postal subsidies given to newspapers or direct grants for public broadcasting—and much, much more—can be understood as at least in part designed to increase positive or to reduce negative externalities.

Third, media products are unusual in that often two very different purchasers pay for the transfer of media content to its audience. The media enterprise commonly sells media products to audiences and sells audiences to advertisers. By paying for audiences, advertisers in effect pay the media firm to provide the audience with something the audience wants—although not necessarily what the audience most wants. Of course, multiple parties affected by a transaction, each thus being a potential payee or purchaser, are not an unusual economic phenomenon—that is basically the definition of an externality. Externalities typically refer to the value of some item to someone who does not participate in the transaction. If one or more persons, often numerous unorganized people, would potentially pay to have the transaction occur, then the externality is positive; it is negative if they would pay to have it not occur. However, in the media context some of this multiple set of purchasers are not merely potential purchasers, and their mutual involvement plays an unusually large and more routinized role. The combination of audiences and advertisers as purchasers have especially significant consequences and adds special complexities. For example, what is the right level of production of television programming? The value of production of a television broadcast is its combined value for the audience and the advertiser. To the extent that the broadcaster only collects from the advertiser, the

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<sup>18</sup> Even where the answer is "yes," reliance on price discrimination introduces an inherently policy-based issue of which consumers ought to have their "consumer surplus" reduced in order to achieve a proper level of production, a central issue in many rate-setting disputes.

broadcaster will apparently have an inadequate incentive to spend money on programming for the public. From this observation, some economists conclude that our society drastically under-invests in television broadcasting.<sup>19</sup>

Multiple purchasers create other issues. For example, there is a potential conflict between advertisers' and audiences' interests in the media content.<sup>20</sup> In the late nineteenth and early twentieth century many papers routinely accepted "reading matter," material prepared by advertisers that promoted their products (or sometimes their political goals) but that was not identified as advertising. Advertisers wanted this material included as apparent editorial content, not advertising, while (presumably) the public would have preferred identification of the material's source. Typically the public wants and expects the editorial portion of news media to represent the journalists' and editors' independent professional judgment. The market brings this interest to bear on the journalistic enterprise to the extent that the enterprise can better sell its publication if it gains a reputation for independence, but in the reading matter case, the market did not suffice to induce the source identification or journalistic independence desired by the public. In response, Congress prohibited the practice for any paper receiving second-class mail privileges.<sup>21</sup>

A fourth aspect of the media relevant to media economics involves why or how audiences value media products. In the standard economic model presented above, people seek products that satisfy various existing preferences. They value the products because they satisfy these prior preferences. When people purchase media products—as when they seek education or advice from psychological, legal, or spiritual advisors—they are often seeking information or guidance for the very purpose of forming preferences. People often want a media product for what I will call "edification," which includes education,

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<sup>19</sup> An early study concluded that the value to Americans of free over-the-air television was at least \$20 billion, which was roughly 10 times the advertising revenue produced. See ROGER G. NOLL ET AL., *ECONOMIC ASPECTS OF TELEVISION REGULATION* 23 (1973). The authors concluded that "by traditional criteria of consumer welfare, not only another network but a very large expansion of television is warranted." *Id.* at 30.

<sup>20</sup> See generally BAKER, *ADVERTISING*, *supra* note 11, ch. 2.

<sup>21</sup> In addition to identifying advertising material, the law required papers to publish the identity of its owners. The legislative intervention may have conformed to the competitive economic interests of some, especially the quality, papers. Still, the law required some editors to print what they would prefer not to print. See *Lewis Publ'g Co. v. Morgan*, 229 U.S. 288, 296 (1913) (upholding the law against a First Amendment challenge); cf. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 254–55 (1974) (invalidating a Florida statute requiring newspapers that attack a political candidate's character to give the candidate free space to reply). The best account of the legislation and the practices leading up to it is LINDA LAWSON, *TRUTH IN PUBLISHING: FEDERAL REGULATION OF THE PRESS'S BUSINESS PRACTICES, 1880–1920* (1993).

exposure to wisely selected information, or wise opinion and good argument. This feature of media is difficult to understand in terms of standard economic analysis. Even if a market can properly allocate resources to fulfill preferences for preference formation activities, a market for this type of product will have unusual features. When a person wants to develop “better” preferences, values, or outlooks, she puts her present outlook or preferences into question without a clearly formulated alternative to put in their place. Thus, her own preferences do not give her a complete standard by which to measure whether her purchases provide the right thing.

This dilemma is not entirely resolvable. How does a person know whether the person she became after seeing the psychologist is the person she wanted to be, or whether her changes would have been better with a different psychologist? Furthermore, from what perspective does she evaluate this—from the views she now has, those she had before, or the views she would have had if she had chosen the other psychologist? Of course, even when people do not know precisely what they want, they usually have rules of thumb for guessing whether they are likely to be getting it. They may know the seller’s or producer’s general reputation for expertise. In addition, they may have reasons to presume the seller or producer exercises independent judgment and to believe that this supplier uses this independence to try to serve the purchaser’s interests—reasons underlying the criteria of professionalism in education, law, psychology, or the priesthood.<sup>22</sup> These concerns provide a catalyst for efforts of the press to portray itself as independent and an explanation for most people’s outrage at any evidence that advertisers influence media’s editorial content.

Of course, people value media products for various reasons. Audiences want media products (sometimes the same media product) for entertainment or for specific information, as well as for “edification.” Attributes that make a media product good for one purpose may not be those that make it good for another. This diversity in functions introduces complications for the notion of the audience getting what it wants,<sup>23</sup> complications that are often exacerbated due to the multiple purchasers—audiences and advertisers. Audience members’ knowledge about how well a media product serves differing purposes often varies. Advertisers, on the other hand, may have greater interest in particular functions. For example, an advertiser may be primarily interested in a movie’s or story’s transformative and informative roles, especially its particular slant and its capacity to persuade. In contrast, the audience may focus most on the

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<sup>22</sup> Some also use rule of thumb indices of the seller’s sharing or, at least, familiarity with and responsiveness to the purchaser’s basic values or perspectives, as might be the case, for example, with a partisan paper.

<sup>23</sup> See *infra* Part IV.

content's potential to entertain; in fact, this focus on entertainment might make some sense if the audience is best situated to evaluate this characteristic. In consequence, the advertiser may pay for, say, a pro-Pepsi informational slant, about which the audience is unaware or unconcerned as long as the slant does not affect the movie's entertainment value. Predictably, advertisers pay for "product placements" where their products are presented within the apparently nonadvertising content.

More generally, when content serves multiple functions but where information about how well it serves each is not equally available to and assessable by the audience, the market creates opportunities for manipulative or ideologically distorted content. If the audience values both the entertainment and edification roles strongly, but if information in respect to a program's contribution to edification is harder to obtain, the audience may choose on the basis of entertainment value in the hope that the different dimensions correlate. This audience strategy reduces the cost to the advertiser in having its editorial choices prevail. For example, tobacco companies could "pay" (*i.e.*, threaten to withdraw advertising) for the editorial slant they want in popular women's magazines. Such payment is, in effect, censorship. It leaves the magazines to report on those health problems of aging, especially those "cured" with cosmetics, that are not related to, or identified as being related to, smoking. The point is merely that the combination of multiple purchasers (audience plus advertiser), multiple ways in which the product is valued, and a disparity of information concerning how well the product serves differing values, can lead to systematic market failures. These factors can combine to produce results contrary to what the audience wants—what it would pay for if it had better information.

## II. PROBLEMS WITH THE MARKET

The four features described in Part I relate to ways in which the market predictably fails to "give the audience what it wants," producing results that on pure economic grounds are not the most efficient use of resources. Here I begin a more careful examination of their consequences.

### A. *Content as a Public Good*

Initially, consider the public good aspects of media content. Once produced, media content is a public good. No one's consumption (*e.g.*, reading, viewing, discussing) prevents anyone else from also consuming the same content. Maximum value results from allowing consumption without charge for the content—although a consumer should pay for any marginal cost

of access. But zero pricing does not compensate the creator and, therefore, the economic expectation is that zero pricing will lead to dramatic underproduction of content.

If content were freely appropriable by any consumer (or distributor), the pricing (that is, the price of zero) would not exclude audience members who value the content, but this pricing, it is feared, would fail to encourage production. Enter the regime of intellectual property—probably the most overt legal response to the public good aspect of media content. Copyright law creates private property rights in content so that authors and creators will receive a reward adequate to induce production.<sup>24</sup> Complexities of copyright law are (or, at least, are supposed to be) a response to its utilitarian aim of influencing both production and distribution in a manner that maximizes the availability and valued use of intellectual content. Thus, copyright aims to recognize private property rights only to the extent that they “contribute” more to production of valuable content than they “cost” in terms of restricting access to and further use of that content.<sup>25</sup> This goal explains (at least in part) doctrines such as “fair use.” Fair use benefits audiences by allowing free use whenever free use adds more value than it “costs” in terms of reduced incentives to produce.<sup>26</sup> Arguably, its maximizing policy is relatively nonideological in merely aiming to efficiently promote “science and the useful arts,”<sup>27</sup> that is, to

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<sup>24</sup> The need to compensate the creator provides the standard economic argument for intellectual property rights, but arguments in favor of zero pricing are imaginable. Commercially produced content, that is, production intended to be profitable, competes to a degree with noncommercially produced content (for example, ideological speech that people spread for political reasons or amateur productions where the joy or pride of expression provides a primary motive for production). Possibly, a culture in which these types of noncommercial communications were more prevalent, that is, where they had less competition from market-oriented, commercially produced content, would be by some measures richer than the commercial culture provided by the mass media.

<sup>25</sup> This last point suggests that content creators can line up on either side of a debate about extending or contracting copyright protection. Moreover, characteristically, different types of creators will line up differently (*e.g.*, noncommercial creative “borrowers” favor less restrictions on the availability of earlier creations while commercial producers are more interested in maximizing their own return than in being unrestricted in their appropriations). See JAMES BOYLE, *SHAMANS, SOFTWARE AND SPLEENS: TOWARD THE CONSTRUCTION OF THE INFORMATION SOCIETY* 51–60 (1996). However, to the extent that a prime value of copyright is creating avenues of distribution, audience-oriented, non-profit-seeking creators may equally have an interest in commercially effective copyright.

<sup>26</sup> Similar economic balancing of gains and losses due to propertizing intellectual content can explain why copyright only attempts to protect the “unique expression” of the idea and not the idea (or fact) itself.

<sup>27</sup> U.S. CONST., art. I, § 8.

make more content more widely available.<sup>28</sup> But on closer examination, copyright law turns out to favor production of some content over other and influences who has access to it. More generally, it can be seen as an aspect of media policy, embodying particular policy choices designed to affect what audiences receive.

Propertization, say of the traditional commons where sheep or cattle grazed, is supposed to solve the problem of underproduction of some goods. Copyright, however, cannot be expected to be such a perfect solution precisely because of the public goods aspect of media content. Here, at least without adequate price discrimination, which I will discuss shortly, market-based firms predictably provide inadequate amounts of the good. Private firms will fail to provide some media content that the audience wants—content whose value as measured by willingness to pay is greater than its cost. Some products will not be produced because there is no price at which the media product can be profitably sold even though its value to all potential consumers is greater than the cost of supplying them. Likewise, another routine feature of goods for which marginal cost is declining is that such goods are often sold at a price that prevents some people from purchasing them even though they would be willing to pay at least the marginal cost necessary to provide them with the good.

A simple example based on a hypothetical two person society, summarized in Table 1, can illustrate these problems.

TABLE 1

	Cost	Demand		
		#1	#2	#3
Copy 1/Person 1	10	9*	12*	9
Copy 2/Person 2	1	6*	5	5
Profitable Selling Price*		5 1/2 to 6	10 to 12	—
Surplus (Value-Cost)		15-11=4	12-10=2	—
Potential Surplus		15-11=4	17-11=6	14-11=3

\*Potential purchasers assume seller's inability (or inadequate ability) to price discriminate.

Hypo #1 shows a declining marginal cost product.

Hypo #2 shows that markets may underproduce this type of product.

Hypo #3 shows that markets may fail to produce a valued product.

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<sup>28</sup> But see *supra* note 24.

In this example, the cost of producing the first copy is assumed to be 10, while reproducing and distributing to the second person is assumed to cost only 1. In the first hypothetical, the product could be properly produced and sold to each person for 6. However, even here, if a third person was added who valued the good at 2, that seller could not afford to sell to each person for 2; thus, that third person would not be supplied even though she values the product at more than the 1 cost of supplying her.

In the second hypothetical, the good could be sold to Person 1 at a price between 10 and 12. Production at this level produces a societal gain, a surplus of 2, with the surplus going either to the seller or buyer or divided between them. This surplus represents the amount that the good is valued by the buyer over the cost to the seller. However, the good cannot be sold at a price of 5 because then the seller's revenue of 10 does not cover the cost of selling two copies ( $10+1=11$ ). The result is underproduction since the value to the unserved Person 2 is much greater than the cost of producing the good for her ( $5-1=4$ ).

Likewise, in the third hypothetical, the good cannot be sold without a loss to Person 1, who would pay 9 for a good that cost 10, or to both parties at a price of 5 because the revenue of 10 would not cover the cost of 11 it takes to produce the original and the copy. The result is that production that could produce social gain, that is, that could produce what people want—a value of 14 at a cost of 11—does not occur. Thus, in typical cases, represented by the second and third hypotheticals, underproduction and inadequate availability of content that is produced are inevitable.

Underproduction and inadequate distribution of media content caused by its public good aspects might be avoided if property owners could perfectly price discriminate in the sale of their goods. Price discrimination is where the seller sells to different purchasers at different prices reflecting the amount that the specific purchaser is willing to pay. For example, in the third hypothetical, if the seller could sell Copy 1 to Person 1 for 9 and Copy 2 to Person 2 for 5, the seller would have an incentive to produce the good—it would be able to generate a profit of 3. This solution is sometimes available. Price discrimination is common in the media realm. Consider, for example, media firms' ability to sell both hard and paperback books, often made available at different times; to distribute video content through different "windows," first in theaters, then pay-television, then video cassette rental, then free-television; or to divide the audience into groups who will pay different subscription rates for the same magazine. Still, often *inability* to price discriminate is good. For example, in the standard model of market competition discussed earlier, price discrimination is not necessary to achieve efficient results. Rather, it merely involves sellers'

exploitation of circumstantially monopolistic positions to transfer wealth from purchasers. More relevantly here, price discrimination inevitably is only partially effective. The problems of underproduction and inadequate distribution will inevitably continue even if at a somewhat muted level.

Thus, copyright and reliance on markets cannot be expected to be a perfect solution to stimulating adequate production of media content. Moreover, an additional problem is that privatization of content through copyright law tilts market production toward particular types of content. In this sense, copyright law can be characterized as a speech-related law that involves content discrimination.<sup>29</sup> Existing copyright law allows privatization of only some aspects of content. For example, copyright only covers the "unique expression," not facts or ideas. If privatization serves its intended purpose of creating production incentives, it should encourage investment in creating and distributing "unique expressions" in contrast to finding, developing, or communicating "facts or ideas."<sup>30</sup> By allowing producers to receive closer to full value for the first but not the second, copyright law has potentially serious consequences for what content is produced. The distinction, for example, could encourage greater investment in unique entertainment content (expression) and less investment in news content (facts).<sup>31</sup> Within news production, these copyright rules favor expenditures on unique or flashy presentation (maybe high salaries for appealing "anchorpersons" who, like the copyrightable words, are a "unique" element) as opposed to expenditures on news gathering, especially on news that is expensive to obtain.<sup>32</sup> These tilts, however, have no

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<sup>29</sup> The Supreme Court has treated facially content-neutral laws as content-based if they had any purpose to affect content. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-43 (1994).

<sup>30</sup> Admittedly, patent and trade secret law covers some commercially relevant aspects of the latter content.

<sup>31</sup> In 1995, the newsroom budget of the *Washington Post*, the paper that brought us Watergate, was reportedly about \$70 million, while the 1995 movie, *Waterworld*, reportedly cost about \$175 million, although this figure includes more than just content creation (for example, an approximately \$30 million marketing budget). *See* Dan Cox, *Soaring Star Salaries Induce Labor Pains*, VARIETY, Sept. 11, 1995, at 1; Richard Harwood, *Extinct Strained Wretches?*, WASH. POST, Nov. 2, 1995, at A31.

<sup>32</sup> Forty percent of viewers refer to the anchorperson as their reason for viewing a network news program. *See* LEO BOGART, COMMERCIAL CULTURE: THE MEDIA SYSTEM AND THE PUBLIC INTEREST 186 (1995). Thus, it is not surprising that as newscasters' salaries increased, the networks fired senior professionals and generally engaged in cutting the costs of news production. *See id.* at 182.

James Fallows, whose main concern is the deleterious effect on democracy of the media's constant cynical emphasis on the competitive, horse-race aspects of politics rather than on its substantive aspects, argues that having a star personality "report" on the top



necessary relation to audience preferences<sup>33</sup>—or their willingness to pay for different content—but rather replicate the peculiarities of the legal order's privatization rules.

Of course, privatizing facts or ideas in order to encourage their production is hardly the appropriate solution. Although in special circumstances (*e.g.*, trade secrets or patents) this seems acceptable and this move is sometimes seen as a plausible way of promoting creation of computer databases, generally the notion of ownership of ideas and facts is seen as offensive. Because a person comes up with an idea or uncovers facts hardly suggests that the person should be able to stop another from independently doing the same and then telling others about it. Even when a person learns something from the originator, the notion that the recipient cannot then repeat it, or reformulate it and then include it in her own messages, is contrary to how thinking and discussion occur. Privatization gives the originator a virtual property right in the recipient's mind and speech. Economic arguments, ranging from costs of enforcement to costs of trying to make efficient use of the information, likewise argue against routine privatization of facts and ideas.

Various responses can reduce the negative consequences of a lack of copyright protection for facts and ideas. For example, the media may successfully nurture desires for speedy news, and, more importantly, for reliable news, and they may be able to teach audiences to correlate these attributes with news organizations that themselves engage in (some) investigations. This would then give the media an incentive to spend money on finding facts and developing ideas. Another response is the government's (and others') heavily subsidized development of information and ideas that are then communicated through the media. Government-supported research universities, prestige-based reward systems within those universities, direct government sponsorship of research, and non-copyrightability of governmentally produced intellectual works serve as examples. Public officials' news conferences and press releases, and similar techniques used by various private sources, create

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current story twists the content of news in a way that contributes to this misdirected media focus because, usually, this star figure will not have expertise or reportorial knowledge of the specific issue but will have general expertise on issues such as how the issue will play politically. See JAMES FALLOWS, *BREAKING THE NEWS* 157–59 (1996).

<sup>33</sup> However, the tilt does relate to the preferences that the media have an incentive to cultivate. A broadcaster or network's exclusive position in respect to a given anchorperson gives broadcasters a reason to promote the merits or appeal of its anchor rather than its less unique news as a reason to "tune in." Whether a self-conscious democratic society would choose to promote this tilt, *see infra* Part IV, is at best doubtful.

and make available considerable information without concern for the lack of copyright protection—although with arguably questionable content tilts.<sup>34</sup>

Still, the basic points remain. The public good quality of media content makes for underproduction. The intellectual property regime both responds to and reproduces this problem. It also encourages production of some content more than other. Responses to this differential underproduction provide only partial cures, and the cures contain their own tilts. The audience gets what the law encourages, not some “uncontaminated” version of what it wants.

### B. *Monopolistic Competition*<sup>35</sup>

The last subsection described how media firms sometimes will be unable to profitably market goods even though the goods' value to consumers is greater than their cost to the firm. The introduction of a competitively successful product can exacerbate the problem. That is, sometimes goods that prevail competitively can reduce social value as compared to the products that they replace. Here, market competition can increase inefficiency, leading consumers (the audience) to get less of what they want.

A simple example, which is summarized in Table 2 and which expands on the illustration used earlier, illustrates this possibility.

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<sup>34</sup> See EDWARD S. HERMAN & NOAM CHOMSKY, *MANUFACTURING CONSENT* 18-25 (1988).

<sup>35</sup> The classic work on monopolistic competition is EDWARD H. CHAMBERLIN, *THE THEORY OF MONOPOLISTIC COMPETITION* (1960). This section extends an analysis that I first presented in BAKER, *ADVERTISING*, *supra* note 11, at 9-13, 73-76. The general type of phenomenon I describe here is explained in CLEMENT G. KROUSE, *THEORY OF INDUSTRIAL ECONOMICS* 190-218 (1990), and applied to a media context in BRUCE OWEN & STEVEN WILDMAN, *VIDEO ECONOMICS* 148 (1992).

TABLE 2

	Product A			Product B	
	Cost	Demand		Cost	Demand
		Time 1	Time 2		Time 2
Copy 1/Person 1	10	9*	9	11	8*
Copy 2/Person 2	1	6*	5	2	7*
Profitable Selling Price		5 1/2 to 6	—		6 1/2 to 7
Surplus (Value-Cost)		15-11=4	—		15-13=2
Potential Surplus		15-11=4	14-11=3		15-13=2

\*Purchases under a profitable sales strategy; hypothetical assumes seller's inability (or inadequate ability) to price discriminate.

*Key assumption:* introduction of Product B has the effect of slightly reducing the demand for Product A, reflected in the change in demand from Time 1 to Time 2.

This hypothetical assumes the new product is somewhat bulky, explaining its somewhat higher cost for Copy 2, and is valued somewhat more similarly by the two people (*i.e.*, has a flatter demand curve). The key feature of this hypothetical, however, is that the availability of the new product is assumed to reduce slightly the demand for Product A. This assumption is obviously quite plausible. This change could, and in the hypothetical it does, change the demand such that it is no longer profitable to produce and sell Product A even though Product A is not only valued by its audience at an amount more than its cost but also its production and distribution would create a greater social surplus than does Product B, which replaces it.

Of course, this is merely a hypothetical. Obviously people are not always worse off when a new media product drives out of existence another product or a set of other products (*e.g.*, a set of products like Product A in the hypothetical). The general point is that there is no way of knowing in the abstract when relying on the market will or will not be beneficial—when the market will lead people to get closer to what they want as they see it. The answer will depend on the specifics of the people's demand curves. Still, although abstract analysis cannot tell which competitively successful content is and which is not economically justified, some observations are possible about when it is more likely that the product that prevails in the market will actually cause a loss. For example, usually the successful but unjustified material will have relatively weak but broad appeal—a comparatively flat demand curve. In

contrast, the economically justified, audience-satisfying material that a free market will fail to produce often will be material with relatively strong, unique appeal.

Most often the effects of monopolistic competition described above will be embodied in the nonexistence (or reduced distribution) of some media products that the audience wants and possibly the existence of some whose net effect is to reduce the extent to which the market satisfies the audience. Below I will consider several possible examples.

### 1. *International Trade*

The recent GATT negotiations almost unraveled over America's initial insistence on free trade provisions covering video products—movies and television. The Europeans, particularly the French, thought something uniquely important (something more than money) was at stake—a belief that seemed almost incomprehensible to most American commentators.<sup>36</sup> Still, the Europeans successfully resisted American demands. This GATT controversy replayed an earlier third world, leftist critique of Western and especially American cultural imperialism. Under the general label of the New World Information Order, during the 1970s and 1980s this critique reached its high point in the UNESCO's MacBride Commission Report.<sup>37</sup> A central claim was that market practices distort information flows and damage cultural and developmental interests of poorer regions.<sup>38</sup> Both the recent French and the earlier third world claims defended their own cultural integrity. Both asserted that the American media products not only swamp their culture but also cause the economic shrinkage of their own cultural industries. The French and the third world complaint could be about negative externalities caused by the imported media products or it could be a claim that market standards of value are inappropriate for evaluating media structures—issues I will discuss in Parts III and IV. But their complaint also could refer to the type of problem discussed above—market competition causing a product to prevail even though it produces less value than the products it replaces.

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<sup>36</sup> See Daniel Singer, *GATT and the Shape of Our Dreams*, THE NATION, Jan. 17, 1994, at 54.

<sup>37</sup> See MACBRIDE COMM'N, INTERNATIONAL COMM'N FOR THE STUDY OF COMMUNICATIONS PROBLEMS, MANY VOICES, ONE WORLD (1980).

<sup>38</sup> See *id. passim*; HERBERT I. SCHILLER, COMMUNICATION AND CULTURAL DOMINATION (1976). In addition to the cultural point, the third world critique raised other issues, especially the comparatively one-way flow of news and control over and content of third world news. See *id.*

The so-called cultural imperialism is easily explained. It occurs because, once made, media products can be reproduced almost costlessly—the “public good” element of media products. A media owner correspondingly gains from any extension in audience, at least if able to maintain the product’s price or to price discriminate, for example, by selling the product for different prices in different countries. As long as the costs of marketing are less than the potential revenue, a media owner will find it very advantageous to extend its market internationally. Unlike local media products, the international marketer does not need to charge for the products’ cost of creation (assuming that domestic sales pay for this). The result is a huge competitive advantage for the imported products that can put many local media products out of business.

Cross-border free trade in these media products does not so clearly increase the range of what is available as change what is available in each country. Even if there were some increase, the new mix is potentially subject to criticism. In the United States, many people complain about the extent that soft sex and action/violence motifs fill both television and Hollywood productions. A major factor influencing Hollywood’s content choices may be less what the American audience wants and more the profits available in exports.<sup>39</sup> Those whose native language is not English or whose culture provides dramatically different social cues and thematic problems can be perplexed by complex verbal exchanges and intricate drama that would appeal to the more “local” American audience. In contrast, people require fewer special skills to appreciate whatever there is to appreciate about *Baywatch*, apparently the world’s most-watched television show.<sup>40</sup> Without an export market, if production costs for a drama and *Baywatch* were the same, and if the producer could get  $X$  dollars selling *Baywatch* to Americans but  $X+Y$  selling the nonexportable drama, the producer would choose the drama. That choice changes, however, if exporting occurs and if the added international sales for *Baywatch* are greater than  $Y$ . If this is repeated over the category of action/violent and soft sex programming,

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<sup>39</sup> Reportedly, U.S. film, television, and home video industries had \$18 billion in revenue, 55% of which came from Europe—compared to our imports of \$300 million of video materials from Europe. See James O. Goldsborough, *Let’s Allow Some Artistic License in this Trade Deal*, SAN DIEGO UNION-TRIB., Dec. 13, 1993, at B5. In 1993, 45% of the U.S. film industry’s revenues or about \$7.1 billion came from overseas. See Jessica Siegel, *Refocusing the Big Picture*, CHICAGO TRIB., Mar. 6, 1994, § 13, at 16. The international market as an incentive to produce American programming with action and violence goes back at least to the early 1970s. See Stephen J. Kim, “Viewer Discretion Is Advised”: A Structural Approach to the Issue of Televised Violence, 142 U. PA. L. REV. 1383, 1424–25 (1994).

<sup>40</sup> See Bill Carter, *Stand Aside CNN. America’s No. 1 TV Export Is—No Scoffing, Please—“Baywatch,”* N.Y. TIMES, July 3, 1995, § 1, at 41. *Baywatch* was canceled after its first season on NBC, but production was able to continue for syndication primarily on the basis of a correct prediction of profitable foreign distribution. See *id.*

Americans may be getting a lot more of these programs than they want, that is, than they would purchase if the United States was the program's sole market.<sup>41</sup>

A mirror image of this process occurs in the countries now flooded with American media products. Often they would have not paid for the American productions if they had to pay the full cost of the item—they receive it only because they are the “beneficiaries” of its public good aspect. As it is, often their own cultural products, which would have survived except for the competition with the American products, are driven out of business.

Still, international trade has the generally beneficial consequence that no national audience has to pay the product's full cost. Therefore, audiences of both nations may be better off. Both may get more of what it wants given the item's actual cost (that is, its reduced cost to them given the contributions of a vast array of other customers spread over the world). However, this may not be so beneficial, as suggested by the earlier discussion of monopolistic competition. Equate the American export with Product B in Table 2. Its introduction may drive out of existence local products even if the local audience values the local product more, that is, even if the local product, like Product A in Table 2, could produce a bigger surplus than the export/import. These “international” products will cause many relatively culturally specific products—both American and those of the import-receiving countries—to become unprofitable even if the local audience continues to want them, that is, even though the local audiences would *still* be willing to pay for the product if the seller could perfectly price discriminate.

Of course, whether the *net effect* of the dominance of export products is negative for either American audiences or those in the receiving country is an empirical question. Only speculation is offered here. The question in each country is whether the loss due to the failure of more culturally unique media products is greater than gain due to the production and sale of the internationally valued product—in the example above, the gain due to the prevalence of *Baywatch*. In economic terminology, the question is whether the lost surplus due to the nonproduction of the locally unique products is more or less than the surplus generated by *Baywatch*. Although the answer will depend on the precise shape of the demand (and cost) curves, some considerations

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<sup>41</sup> In a comparison of Nielsen ratings of violent and nonviolent network prime-time dramatic programs during the 1988–93 period, each year the nonviolent programs got a significantly higher rating. See George Gerbner, *Marketing Global Mayhem*, 2 THE PUBLIC 71, 74 (1995). A comparison of 250 U.S. programs exported during a given year with 111 programs only shown in the United States found violence to be the main theme in 40% of those shown only locally but in 49% of the exported shows and “crime/action series comprised 17 [%] of home-shown and 46 [%] of exported programs.” *Id.* at 75; see also Kim, *supra* note 39, at 1430–31 & n.214.

suggest that restrictions on the American exported product would lead to more audience-satisfying results. The demand for a successfully introduced international product is likely to be comparatively flat, but quite broad. On the other hand, the losing, culturally unique product is likely to have been more intensely valued by its audience but failed to have a sufficiently broad audience, that is, it is likely to have had a more steeply declining demand curve. The international product probably sacrifices content intensely valuable for unique local audiences in favor of material reasonably appealing to a huge audience. If this is right, the result will likely correspond to the one illustrated in Table 2. The international competition will not be value-maximizing, that is, the products that prevail in the unrestricted international market will not be those that audiences want. Only restraints on international trade in such media products can produce value-maximizing or efficient results.

## 2. *Advertising-Supported Media*<sup>42</sup>

Like an international audience, introduction of advertisers adds a second set of purchasers whose preferences for media content at least potentially diverges from that of the media's audience. Most commentators, often even economists,<sup>43</sup> assume that if the media is to serve content preferences, it is the preferences of the public—the reading and viewing audience—that should prevail, not those of the public plus the advertisers. However, even if the relevant standard is maximizing value from the combined perspective of the preferences of audiences and advertisers, the result produced by the market may not be economically efficient or, more relevantly here, may not give the audience what it wants. The basic claim, played out below, is that the prevailing advertiser-supported media may be like Product B in Table 2 and that it may drive out the more valued media content illustrated by Product A.

Of course, if advertisers merely contributed financial support to give audiences what they want (plus ads), a divergence would not be so obvious—but that scenario is implausible. Advertisers' concerns and audiences' preferences will surely overlap since advertisers want to obtain audiences for their advertising messages. That, however, is only one of the advertisers' concerns, and their other concerns will sometimes override or at least modify the first consideration. Advertisers influence media enterprises to give audiences messages that advertisers want them to receive—sometimes, simply

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<sup>42</sup> This subsection is based on a more detailed account in BAKER, *ADVERTISING*, *supra* note 11.

<sup>43</sup> See, e.g., BRUCE M. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* 1–202 (1975).

messages that support the advertisers' products. Advertisers also influence media (that is, they pay, either directly or indirectly) to provide audiences with content that does not disparage the advertisers' products or political agenda, that puts audiences into a "buying mood" or creates a receptiveness to ads, or that avoids offending potential customers in a manner that could spill over into offense at the advertiser. Although often proclaiming editorial or creative independence, media executives recognize that people (or entities) who pay can and will influence content. Clearly, the consequent influence of advertisers corrupts the democratically defensible justification for the media and, more relevantly here, undermines the media's orientation to give audiences the informational and cultural content that the audiences want.

In response it might be argued that advertisers' interests are not inherently illegitimate, that they ought to be taken into account, and, in any event, that advertisers' participation makes the media product cheaper and thus more accessible to the public. Thus, the issue parallels the discussion of international media markets. It could be asked whether the goal is to provide (American) audiences what they want without that content being influenced by "other" purchasers—the advertiser (or the foreign consumer). Alternatively, should the goal be to provide audiences with what they want among products, some of which will cost less due to purchases by advertisers (or foreign audiences)? Arguments can be made both ways. Accounts that emphasize unique or special values of news, informational, cultural, or other media products routinely characterize the influence of these other purchasers as corrupting. On the other hand, pure market accounts often argue in favor of all potential purchasers having the influence that their expenditures justify, and argue that, if people want, they can buy ad-free (or locally produced) media products. This market perspective notes that although people may prefer content that the advertiser did not influence, if cost is ignored, in the real world these people may prefer influenced content, given its cheaper cost. From this perspective, the question is always: are people getting what they want, given the cost? Although I am sympathetic with, and will later argue for, the first account, in this section I will stick to the pure market approach and ask whether the market predictably provides audiences what they want, given some products' reduced cost due to advertisers' support.

Initially, an important difference between advertisers' and international audiences' influence should be noted. Typically, neither the media nor the advertiser wants the advertisers' influence on nonadvertising content explicitly known. Advertiser influence on the media's nonadvertising content conflicts with the media's claim to provide the public with professional judgment and independence. This is a pivotal value. A physician would find it bad for business if the public knew that a pharmaceutical company's payment



influenced her choice of which medicine to prescribe. Likewise, a publisher would find it damaging if the public knew that it routinely bowed to advertisers' directives. The public, however, often finds it difficult to determine whether the media is satisfying its preference for receiving a "noncorrupt" product. This informational inequality between the public and the advertisers makes the situation ripe for systematic market failures. Sometimes, an audience will not receive what it wants (and would pay for) because its lack of information results in it paying anyhow.

Other than their direct concern with editorial content, advertisers' main concern, what they pay for, is "audience," usually a somewhat targeted audience. The audience may be targeted geographically (local newspaper advertisers want local audiences), economically (usually at least somewhat upscale, since the advertiser only benefits from those who can pay for the product), demographically (often the advertiser's product has a bigger potential market among a particular age or gender group), or interest-based (sellers of golf products want most to reach golfers). The impact of advertisers is to increase the prevalence of media content relevant to their targeted audiences. Although most easily observable in magazines and television, this targeting effect can be found in all media receiving advertising support.

In terms of revenue, newspapers are selling readers to advertisers even more than they are selling newspapers to readers. This makes their primary incentive to provide a package that has the broadest, even if shallow, appeal except for sometimes slighting material of special interest to relatively poor and poor minority audiences who are not good markets for the advertisers' products. This creates at least some disincentive to provide material for which a comparatively small group would pay a higher price, but which would be offensive or a turn-off to another audience segment.<sup>44</sup> That is, the gain from selling audience size to advertisers reduces any incentive a newspaper would otherwise have for product differentiation that appeals to small segments.

This advertiser-rewarded orientation has supported development of "objectivity" as newspapers' ruling norm. A purportedly objective approach that offends few people will leave more people reasonably satisfied even if it leaves them less politically engaged than would more partisan reporting.<sup>45</sup> As

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<sup>44</sup> In contrast, since newspapers do not expect any reader to read all the paper, they often add (generally) unoffensive content aimed at expanding their audience, in a trade-off between the added expense of providing this material for everyone and the added value (primarily to advertisers) of this added audience. Of course, this incentive applies to all newspapers and thus is a quite weak incentive for product differentiation.

<sup>45</sup> Despite advertising's effect of reducing the cost of newspapers to the public, its effect of reducing partisanship could also reduce the total audience for newspapers (which even in a nonpartisan form are a major stimulant for voting and political participation). See BAKER,

product differentiation declines (which, given its primary local markets, should occur for daily newspapers as the proportion of their revenue from advertising increases), the declining average cost structure of local newspaper production should lead to monopoly papers. This is precisely the historical pattern that occurred in the late nineteenth and throughout the twentieth century as advertisers' revenue contribution steadily increased. However, other explanations of monopoly papers are available, and the actual phenomenon probably reflects multiple causes.

More generally, the effect of advertising on diversity is complex. Advertising helps pay for content especially appealing to audiences targeted by advertisers, thereby potentially increasing an advertiser-specified diversity in some media, such as magazines, while undermining diversity in other media, such as newspapers. Since both effects involve reducing the price audiences are charged for advertiser-supported content, the question remains: does this give audiences what they want? In fact, does this give them even more of what they want, since they do not have to pay all the costs?<sup>46</sup>

The answer is unclear. Media products that succeed due to advertising support will often depress demand for others, sometimes causing these other media products to fail. Within monopolistic competition, these failing products typically have a declining average cost and often have, at best, limited ability to engage in price discrimination. But audiences may still value many of these no longer commercially viable media products—the audience may value the products more than the products cost to produce. Descriptively, the success of advertising-supported media will result in failure of more differentiated, competitive daily newspapers, of some general audience magazines, and of magazines that appeal to groups whose interests do not overlap with use of any particular set of consumer products. Groups whose demographics are comparatively diverse or whose members are comparatively poor and whose unifying interests or activities do not implicate particular categories of consumer products will be disadvantaged; often those disadvantaged will include those of politically defined groups. For example, few advertisers find *The Nation* to be a

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ADVERTISING, *supra* note 11, at 17–20. Newspapers' failure to target poor, often minority audiences, is apparently one cause of comparatively less political participation of these groups. *See id.*

<sup>46</sup> A frequent criticism of advertising—that advertising rips off consumers by making them pay higher prices for the advertised products, thereby making them pay for being manipulated into making the purchase—is too simplistic. First, by increasing the market for the advertised product, advertising sometimes leads to a reduced price to the consumer. Second, if after the advertising, people value the product more than they would otherwise, they may be getting something that they value more than they would without the advertising—so the advertising arguably increases their satisfaction. Of course, neither point unambiguously supports the merits of expenditures on advertising. *See infra* Part IV.

particularly good advertising vehicle. A feminist journal, especially if it is aimed at an age- and class-non-specific, multicultural audience might have a large potential audience but would be hard pressed to find its advertising "niche."<sup>47</sup>

Parts III and IV will note other possible critiques of the influence of advertising on content. The point here is that the consumer surplus produced by the prevailing advertising-based media could be less than would have been produced by the non-advertising-based media—media that do not exist because of competition from these advertising-supported media. Whether this occurs in any particular instance cannot be determined a priori. However, there are bases for speculation. For example, in the competition that leads to only one daily newspaper existing in an area, the prevailing paper is likely to be less product differentiated than those it replaces. Its demand curve is likely to be flatter (although broader) than the demand for competing papers that uniquely appeal to a portion of the audience. This characteristic provides some reason to expect that the competitive winner creates less consumer surplus—provides the audience with less of what it wants—than would newspapers that would otherwise exist. In other cases, ranging from advertisers' greater support for magazines like *Women's Golf* to their minimal support for others like *The Nation*, the complaint is not merely that the consumer surplus will be greater for failed titles than those that exist; in addition, the advertising encourages, allows cheaper satisfaction of, and thus increases the sway of some content preferences while disadvantaging others, arguably "distorting" the market.<sup>48</sup>

### 3. *Ruinous Competition: Too Many Products, Too Much Fake Diversity*

Monopolistic competition can generate too many products as well as too few.<sup>49</sup> In the above examples, a firm had no incentive to internalize the value lost due to the elimination of consumer surplus when its new product drives out media products that would still produce more value than they cost but that become unprofitable given the inability to price discriminate. This lack of internalization potentially leads to inadequate diversity. But the opposite can occur. Wasteful competition occurs because the producer of the new product has no incentive to consider its impact on the demand for and hence revenues produced by surviving competitors. If the *decline* in the surplus produced by resources still used by the competitor is more than the surplus (profit plus

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<sup>47</sup> See Gloria Steinem, *Sex, Lies & Advertising*, MS., July/Aug. 1990, at 18.

<sup>48</sup> Strictly, this last point fits the argument made in Part IV and is not a complaint about the "inefficiency" of the market process.

<sup>49</sup> The argument in this section generally follows KROUSE, *supra* note 35.

consumer surplus) produced by the new product, the result can be wasted resources.<sup>50</sup> Competing media firms' expenditures on their respective products may produce (roughly) the same benefit for the public as expenditures by a single firm on a single product. For example, both NBC and ABC evening news might cost roughly the same to produce, but the public might receive virtually the same value, an evening news program, whether or not the second

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<sup>50</sup> Rather than dissipating monopoly profits among the competitors, some arrangements allow one "winner" to gain all the reward. Markets so structured often attract numerous more or less equivalent "competitors," each of whom "spends" resources on trying to win, with the result being the same result discussed above—a dissipation or waste of resources. Michael Madow identified this process as occurring in the context of "star creation," and proposed that by denying a property right in one's image, that is, denying a "right of publicity," the law could not only increase the availability of cultural resources to new creators and entrepreneurs, but could reduce the incentive to engage in the economically wasteful effort to become a star or sports hero. See Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 125, 205-25 (1993). This is also a primary mechanism producing waste identified in ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* 167-89 (1995). Winner-take-all markets create a heightened incentive to spend resources on defending one's status as winner or tearing down efforts by others—mechanisms that often include advertising—that do not produce value but only determine who receives it. Frank and Cook argue that this type of market has become increasingly common today. One of their most interesting policy observations is that, in order to decrease the personal incentive to participate in this type of market—to be the top executive, the movie star or model, the sports hero—much higher income taxes for very high incomes, whether or not the 91% rate that existed when John F. Kennedy took office in 1961 would increase "efficiency" or social wealth. See *id.* at 58, 121-23, 212-17.

exists.<sup>51</sup>

If everyone receives (without requiring additional use of resources) the benefit from the creation of "public good X," a competitor's expenditure on providing a virtually identical good benefits no one—it merely wastes resources. If the public can get from a single wire that passes in front of its house the same content or services that it can get from a second wire (and if the greater use of a single wire involves no, or minimal, added cost), the resources

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<sup>51</sup> This loss can be described by a Table similar to those used above:

TABLE 3

	Product A			Product B	
	Cost	Demand/Value		Cost	Demand/Value
		Time 1	Time 2		Time 2
Copy 1/Person 1	10	6*	6*	1	1
Copy 2/Person 2	1	5*	5*	1	1
Copy 3/Person 3	1	5*	5*	1	1
Copy 4/Person 4	1	4*	3	6	4*
Copy 5/Person 5	1	3*	2	1	3*
Copy 6/Person 6	1	3*	2	1	3*
Profitable Selling Price		3	5		3
Consumer Surplus (Value-Revenue)		26-18=8	16-15=1		10-9=1
Profit (Revenue-Cost)		18-15=3	15-12=3		9-8=1
Total Surplus (Value-Cost)		26-15=11	16-12=4		10-8=2

\*Purchasers at profitable selling price; hypothetical assumes seller's inability (or inadequate ability) to price discriminate.

*Key assumption:* introduction of Product B has the effect of slightly reducing the demand for Product A at Time 2. Although not illustrated here, often Product A will survive but only with both a reduced audience and with cost cutting on Copy 1, creating a degradation of the quality of product available to Persons 1, 2, and 3.

*Goal:* to maximize surplus, *i.e.*, Profit plus Consumer Surplus. At Time 1, Total Surplus=11; at Time 2, Total Surplus=4 for Product A and 2 for Product B or a total of 7. Thus, introduction of Product B caused a net decline in value produced.

devoted to providing the second wire presumably provide no benefits.<sup>52</sup> Likewise, the public good aspect of media content means that it can be shared by many without added content production costs. However, without price discrimination, an enterprise will charge a price at least sufficient to recover its costs, and a monopolistic producer may charge even more. These monopoly profits attract competitors. Assuming that the competitor's product is not substantially different from the original monopolist's, its entry may not give the audience any more of anything it wants. Rather, the entrant will merely take customers from the original firm, thereby reducing its monopoly revenue (and profits) by an amount sufficient to cover the entrant's costs plus any profits it garners. The result is inefficient—almost twice as many resources spent on producing roughly the same value. Still, as long as both firms obtain enough customers to cover their costs, this competition could continue for a long period of time.

From the consumer's point of view, the ideal would be a single, efficient monopolist that does not pocket monopoly profits. Something close to this could result either from regulatory pressure, firms' strategic pricing behavior aimed at heading off competition, or firms' non-profit-maximizing decisions to favor public service or professional standards. The media enterprise could either price the product as low as possible or devote monopolistic profits to improving quality. For example, a public-spirited, family-owned monopolistic newspaper might give the newsroom a bigger budget, devoting potential profits to public service elements of journalism. A regulated cable monopoly could equip and support public access facilities or provide cable access even to nonprofitable sections of the community. These expenditures may even be economically justified by what people would potentially pay, even though they are not justified for a profit-maximizing monopolist that is unable to fully price discriminate. Under these scenarios, audiences could lose from the introduction of competition. Competition would take the potential "monopoly profits" that the monopolist "spent" on consumers and instead use them to cover the costs of producing duplicative media content.

The FCC's now mostly repudiated *Carroll* doctrine<sup>53</sup> recognized that sometimes licensing a new broadcaster in a community could produce ruinous competition harmful to the public. As the *Carroll* court noted, the FCC should of course not deny a license merely to benefit existing licensees. Still, sometimes a new licensee would add little valuable diversity or quality to the

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<sup>52</sup> Of course, sometimes monopolists will be so wasteful or so oriented to reaping maximum monopoly profits that potentially wasteful competition—the second wire—will benefit the public.

<sup>53</sup> See *Carroll Broad. Co. v. FCC*, 258 F.2d 440, 440–44 (D.C. Cir. 1958). This doctrine has been largely abandoned. See 3 F.C.C.R. 638, 638 (1988).

available programming. Given that the various broadcasters must share the same advertising base, and especially if a new entrant's programming categories largely duplicate those of the established licensees, the new entrant's primary effect might be to reduce the established stations' revenue and hence programming budgets. The resulting decline in service could produce a loss to the public that is greater than any gain from the new, presumably low cost programming that the new licensee presents. Of course, there is no market mechanism to indicate when this occurs. Hence, existing licensees' self-interested claim that granting the new license will have this effect cannot be easily evaluated. Still, the criterion of giving the audience what it wants, or the statutory charge to the FCC to engage in public interest regulation,<sup>54</sup> would seem to require an attempt.

For roughly the same reasons, under certain conditions, monopolistic ownership of local broadcast channels would produce more beneficial results than competition.<sup>55</sup> Assuming three competing stations and three programming categories where 70% of the audience strongly prefer type A, 20% type B, and 10% type C, the three competitors are likely to each provide type A, with each on average getting one-third of 70% (23 1/3%) of the audience. But if a monopolist controlled all three channels, having no incentive to compete with itself, it could introduce a different type of programming on each channel in order to increase its total audience. It would gain those viewers who prefer B and C but do not bother to watch A. Here, consumer welfare would be better served—the audience would get more of what it wants—with monopolistic ownership. Competition would produce a wasteful use of resources—too many of virtually identical products.

An issue repeatedly litigated on First Amendment grounds was many communities' policy of granting exclusive licenses to cable companies.<sup>56</sup> Here

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<sup>54</sup> See Communications Act of 1934, 47 U.S.C. § 303 (1991). Obviously, denial of a license under this reasoning would result in the government preventing someone from broadcasting for reasons other than physical scarcity of airwaves. The Supreme Court noted but said nothing about this point in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 401 n.28 (1969).

<sup>55</sup> This phenomenon has been often noted. See, e.g., OWEN & WILDMAN, *supra* note 35; Matthew L. Spitzer, *Justifying Minority Preferences in Broadcasting*, 64 S. CAL. L. REV. 293, 304 (1991).

<sup>56</sup> See, e.g., *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 488-97 (1986). An alternative First Amendment view would be that the government could provide for a monopoly cable franchise just as it has monopoly telephone service but, if it does so, it is constitutionally required to impose public access or common carrier obligations in respect to at least some portion of the system's carrying capacity. An ACLU suit challenging Kansas City's elimination of a public access channel raised this claim among others. See generally

again, competition could reduce consumer welfare and give the audience less of what it wants. If cable hardware, such as the wires, is a large part of the system's cost, and if stringing two sets of wires by each house significantly increases that expense, adding a new competitor could significantly increase the costs that the cable audience must cover.<sup>57</sup> The same set of people must now pay all the costs of two companies and two sets of wires rather than the costs of one. If regulation forces the single operator to engage in efficient behavior and to return its potential monopoly profits to the public, either in the form of lower rates or public service programming (for example, local public access, governmental, or educational channels), the monopolistic cable operator would provide greater benefits to the public than could be obtained through competition.

Again, the optimal arrangement cannot be determined in the abstract. However, actual examples where, for short time periods, competition between cable companies produces either better service, better program offerings, lower prices, or all three do not speak to the long-run better scenario.<sup>58</sup> The same is true in respect to whether phone companies, if they are allowed to carry cable programming over their wires,<sup>59</sup> will eventually carry all cable programming,

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MARC A. FRANKLIN & DAVID A. ANDERSON, *MASS MEDIA LAW* 759 (5th ed. 1995). I participated in the discussions leading up to this litigation.

<sup>57</sup> This particular duplicative cost would not occur if all cable systems could use the same wire (for example, a fiber optics line installed and owned by the phone company). Fair usage of this line is more likely if operated on common carrier principles, which would be easier to police if the phone company had no incentive to favor its own cable products. The FCC and then Congress imposed this regulatory separation by forbidding phone companies from providing their own cable content to the public. Nevertheless, industry convinced several lower courts that this approach borders on irrationality. *See Chesapeake & Potomac Tel. Co. v. United States*, 830 F. Supp. 909, 909-32 (E.D. Va. 1993), *vacated and remanded to determine if moot*, 116 S. Ct. 1036 (1996). It has now convinced Congress that deregulation and competition is served by eliminating this separation. *See Telecommunications Act of 1996*, Pub. L. No. 104-104, 110 Stat. 56 (1996). *But see Baker, supra* note 6, at 97-136 (criticizing the First Amendment challenge and arguing that the then existing law, which allowed phone companies to be only carriers, not sellers, of programming, was most likely to result in competition and diversity in programming).

<sup>58</sup> Thomas Hazlett points to cases where cable competition produces better service and/or lower prices. *See Thomas W. Hazlett, Duopolistic Competition in Cable Television: Implications for Public Policy*, 7 *YALE J. ON REG.* 65, 90-113 (1990). However, these may be primarily short-term effects of a struggle to become the monopolist—most situations of “overbuilding” have resulted in eventual sale of one system to the other.

<sup>59</sup> Allowing phone companies to carry cable programming, as was to be allowed under the “video dialtone” rules, does not speak to whether the phone company should be allowed to be the owner and marketer of the programming. *See Baker, supra* note 6, at 100.



including that of competing program packagers, or whether a two-wire world will persist.

The same issue can arise in respect to local newspapers. Given the unfortunate modern decline of differentiation between local dailies, a single newspaper may serve a community better than competitive papers. Since a significant portion of the newspaper's expense goes to producing the public good element—the so-called “first copy costs” such as news gathering, editing, and layout—and since the potential revenue base from audience and advertisers stays the same whether there are one or more papers, the amount the paper can devote to the first copy, which is crucial for product quality, should decline as the available revenue is split between multiple papers. A single paper has a (potentially) larger audience and advertising base from which to derive revenue, which it could use either to keep its price down or to provide a larger editorial budget or both. If the monopoly paper is more committed to journalism than to maximizing profits, it should be able to produce a better product than it could if faced with competition. Thus, the monopoly paper might serve the community better than two similar, but weaker, competing papers.<sup>60</sup>

The issue is complicated, however, in part because of the difficulty in describing, much less measuring, what is meant by “serving a community better.”<sup>61</sup> Many media commentators have argued that competition itself produces papers that are observably better, although in ways that are hard to quantify, and that competition between papers, producing at least some degree of choice, should be counted as inherently good.<sup>62</sup> Moreover, at least one empirical investigation found that a typical competitive paper devoted more resources to its editorial product and maintained lower per copy prices than did the typical monopoly paper—a result that may reflect the incredibly profitable

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<sup>60</sup> Exploitation of a monopolistic position to increase profits may, however, be the more common response. Still, although viewing the case as atypical, Leo Bogart notes that the *Philadelphia Inquirer* expanded its editorial staff after the failure of the *Bulletin*. See BOGART, *supra* note 32, at 200. Although William Blankenburg avoided endorsing monopolies, he commented that “if news-editorial quality can be equated with expenditures, then it's better to have a single large daily than two half its size.” William B. Blankenburg, *Newspaper Scale & Newspaper Expenditures*, 10 NEWSPAPER RES. J., Winter 1989, at 97, 101. Robert Entman notes the deep-pocket argument favoring monopoly as well as various other hypotheses concerning why competition or monopoly papers would be better, but finds the empirical research to be inconclusive. See ROBERT M. ENTMAN, *DEMOCRACY WITHOUT CITIZENS* 91–101 (1989).

<sup>61</sup> See C. Edwin Baker, *Ownership of Newspapers: The View from the Positivist Social Science* (1994) (unpublished research paper, Shorenstein-Barron Center).

<sup>62</sup> See BEN H. BAGDIKIAN, *MEDIA MONOPOLY* (4th ed. 1992); LEO BOGART, *PRESS AND PUBLIC* 352–53 (2d ed. 1989).

monopoly newspapers' tendency to take money out as profits rather than to lower prices or increase the newsroom budget.<sup>63</sup>

#### 4. *A Solution and New Problem: Price Discrimination*

The inability to adequately price discriminate has been assumed in the discussion so far. It is only this inability that leads to underproduction of media content (or any other item with sufficient public good elements) and to the possibility that monopolistic competition will drive out more valuable content and replace it with content less valuable from the perspective of consumers. This assumption should be relaxed. Media owners have always engaged in some degree of price discrimination. They serialize a story in a newspaper or magazine, then sell it as a hardback novel, and then as a cheaper paperback. Newspapers effectively sell cheap, for example, when multiple, sometimes poor readers share a single copy, but sell at a "higher" price (per person) where one person or family is the only user. Magazines sell at different subscription rates depending not merely on the reader's value to advertisers but on the purchaser's willingness to search for a cheap rate. These are all examples of price discrimination, and the list could go on and on. Technological change also often increases opportunities to price discriminate. Movie producers always had the ability to engage in some price discrimination. They could charge different prices in different geographical areas, to different age groups, at different times of the day or week, and at different times after release. But new marketing "windows" have increased this capacity. The producer can show the film first in theaters and then move through various additional distribution channels—pay-television, video sales and rentals, free-television, and maybe "on-line." Although price discrimination will never be perfect, its occurrence surely reduces some of the problems described above.

Taking price discrimination into account, however, adds a new complexity. Opportunities to price discriminate vary among communications products, a variation both between mediums and, within a medium, between product categories. This variation has two important consequences. First, there should be less underproduction of media products that are best able to price discriminate. Second, by introducing (or increasing) price discrimination,

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<sup>63</sup> See BAGDIKIAN, *supra* note 62, at 201-02; John C. Busterna et al., *Competition, Ownership, Newsroom and Library Resources in Large Newspapers*, 68 JOURNALISM Q. 729, 729 (1991); Gerald L. Grotta, *Consolidation of Newspapers: What Happens to the Consumer?*, 48 JOURNALISM Q. 245, 248 (1971). Lower prices or higher newsroom budgets in competing papers may also reflect short-run strategies of deep-pocketed companies that operate at a loss while seeking to become the surviving monopolist. See *Michigan Citizens for an Indep. Press v. Thornburgh*, 868 F.2d 1285, 1285-1306 (D.C. Cir. 1989).

products that now succeed will take up more of the market than before. Their success (or greater success) will often cause a downward shift in the demand for other products, often leading those other products to be unprofitable.<sup>64</sup> Sometimes, production of these products is no longer economically justified—the audience now values them less than they cost to produce. But at other times this will not be so. The failed product will still be economically justified but no longer commercially viable. Especially when the failed product is comparatively unable to price discriminate, its failure may reflect the destructive monopolistic competition described above. Even though it would still produce a surplus of value over cost, there is now no price at which it can be profitably sold. The net result is that many products that best provide the audience with what it wants are driven out by their comparative inability to price discriminate. In contrast, since price discrimination merely converts consumer surplus (or lost low-priced sales) into revenue, the successful price-discriminating product may produce comparatively little social surplus.

Media products' comparative capacity to price discriminate is an empirical matter. The slant—what types of media content will be favored and what will be disfavored—cannot be determined *a priori*. Still, hazardous as it may be, some broad speculation is possible.

First, the persistent opening up of new delivery channels for video products—basic and pay cable channels and VCR technology combined with rental and sale of video tapes to consumers—is likely to have increased the capacity to price discriminate in these media as compared to print.<sup>65</sup> This would cause audiences to receive an increasing (possibly inefficiently large) supply of video products and a decreasing (possibly inefficiently small) supply of written material.

Second, some types of content within a given medium may be more susceptible to differential packaging and hence increased price discrimination than others. Due to its limited time salience as well as its relative lack of copyright protection, news and factual content may be less subject to price discrimination than is fiction or fantasy material. Of course, news content can be immediately sold by wire or on-line, quickly broadcast, then sold in a newspaper and maybe a weekly magazine, and finally used in a documentary or integrated into a book. Nevertheless, the original producer may have more control, and thus more of these options, with “expressive” (copyrightable) video presentations of news rather than with the news itself, creating too great

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<sup>64</sup> Cf. *supra* Part II.B, Table 2.

<sup>65</sup> Computer databases containing demographic information and allowing its manipulation, as well as various other relatively new devices, may give owners of written media products greater capacity to target discrete audiences and potentially to price discriminate.

an incentive to develop news susceptible of appealing video presentation and too little an incentive for print-oriented investigative journalism. Thus, although the consequence for news production of variations in the opportunities for price discrimination is an empirical issue, unfortunate results seem probable.

Third, the activity of price discrimination—marketing the material through different channels or windows—itself often requires large investments. Whether creating a window is worth the cost largely depends on how much additional revenue the window can produce. The obvious consequence is that “blockbusters” will generally be better positioned to price discriminate than products whose smaller audiences are less likely to pay the cost of using all potentially available windows.<sup>66</sup> The predicted result is that the most popular media products are likely to become even more dominant—inefficiently dominant. The result is that more diverse media content that audiences also want—that audiences value more than it would cost to produce—is likely to be underproduced.

Fourth, to the extent that price discrimination involves using different “windows,” increasing price discrimination is usually cheaper and more convenient if the owner of the media product operates within all of the various channels. One of various “synergies” in media mergers that only dubiously relates to the public good is the merged firms’ capacity to utilize more windows in marketing a media product. The point here is that this is likely to contribute to the undue dominance of the products of these merged firms—with “undue” meaning contrary to the goal of maximizing what audiences want—as a result of their superior ability to price discriminate. The same point applies with respect to media products marketed internationally because these additional markets typically allow sales at a different price than in the home market.

In sum, although the ability to price discriminate may reduce some of the “inefficiencies” created by monopolistic competition among goods with significant public good aspects, the variable ability to price discriminate is likely to exacerbate other market distortions.

### III. SELLING AT FULL COST: INCLUDING EFFECTS ON THIRD PARTIES

The most commonly recognized reason for markets to produce “inefficient” or non-wealth-maximizing results<sup>67</sup> is “transaction costs” that

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<sup>66</sup> This effect is in addition to blockbusters’ capacity to produce monopoly or “winner-take-all” profits, which creates inefficient incentives to invest in producing blockbusters. See FRANK & COOK, *supra* note 50.

<sup>67</sup> The economic concept of “efficiency” is *inherently* indeterminate in the policy context of choosing legal rules. A choice of a rule (or disposition of a case) both will affect the parties’ wealth and, often, will influence people’s preferences. However, determining the

prevent some costs and some benefits from being brought to bear on market actors. The failure to bring these costs and benefits into the actor's economic calculus is often described as an externality. Pollution is a standard example of a negative externality; a beautiful view observable by the public is an example of a positive externality. If negative impacts of an activity are not brought to bear on the actor, the predictable result is too much of an activity; where positive externalities exist, too little of the activity can be expected. Failure to bring these effects to bear on the actor can also lead the actor to behave in a less

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efficient choice depends on assuming some distribution of wealth and some set of preferences. The purported solution of assuming the existing distribution of wealth is conceptually unavailable when the content of the existing distribution is precisely what the choice of a legal rule or outcome of a case places at issue. Likewise, unquestioning reliance on existing preferences seems misguided when the decision in question will predictably change those preferences. Thus, as a positivist efficiency analysis, typical versions of law and economic methodologies are systematically incomplete and the efficiency criterion is often indeterminate. See C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 3-48 (1975) [hereinafter Baker, *Ideology*]; C. Edwin Baker, *Posner's Privacy Mystery and the Failure of Economic Analysis of Law*, 12 GA. L. REV. 475, 475-511 (1978) [hereinafter Baker, *Posner*]. In contrast to the overt inadequacy of this economic analysis as positivist theory, a Marxist addition makes for potential descriptive completeness—when alternative results would both be “efficient,” the Marxist theory could predict that the law will typically choose the solution that adds to the ruling economic class' wealth or power. See *id.* Analytically, law and economic analysts adopt this ruling class orientation when they assume for purposes of analysis that a value is a person's “willingness to pay,” an assumption using an allocation of wealth that advantages the wealthy, as opposed to “price for which a person would sell,” a standard that comparatively favors the poor.

None of the above denies, and this Article implicitly assumes, that welfare economics can be extraordinarily useful in examining relevant aspects of the legal order. On the other hand, this economic analysis can be equally dangerous to the extent it dominates consideration of legal issues. The analysis's linguistic commodification of all valued elements of human existence may contribute to making such commodification intellectually and socially acceptable, while human flourishing requires that many elements of life not be commodified. See generally MARGARET JANE RADIN, *CONTESTED COMMODITIES* (1996). The analysis's reductionist orientation often causes it to assume precisely the issues most relevant in dispute. More generally, the most important issues the legal order faces today are normative—they relate to proper distributions of wealth and power and to what preferences or values should prevail in various contexts. These issues are inevitably seriously contested and the perspectives that different groups bring to bear on them differ, often profoundly. The methodologies that are often most important—and hence methodologies that should be at the core of legal education—are ones that aid in seeing different perspectives and that aid in self-reflective development of different perspectives. If the reductive allure of economic problem solving causes the neglect of these more difficult methodologies, we are all losers.

than optimal manner (*e.g.*, to fail to install a cheap and effective pollution control device).

"Giving the audience what it wants" can only sensibly mean doing so within some cost constraint. Usually the person who invokes the notion means that the audience should get what it wants given its willingness to pay the cost. Many people would like to see Broadway-quality productions for free at their local theaters, but this observation is not thought to demonstrate that giving audiences what they want requires making this opportunity available. "Giving the audience what it wants" means giving it a Broadway-quality production only if the audience is willing to pay its real or actual cost. The notion of externalities, however, refers to a real cost or benefit that is not brought to bear on the transaction. The seller either over- or under-calculates the product's cost and, for this reason, charges the audience more or less than the product's cost. The audience receives either more or less of the content that it would want if it were required to pay the real costs. Thus, in trying to determine whether media markets operate to give audiences what they want, it is crucial to come to grips with the types of externalities prevalent in these markets.

For net externalities to be positive means that the media-product produces value for which the media-firm does not receive payment. If the firm did receive this payment, it could still be profitable, and could still succeed in the market, even if it charged its audience less than it must now charge in order to survive. Of course, standard economic theory claims that normally, if the price goes down, more people will buy more of the product. That is, when externalities are positive, the audience will get less of the media content than it wants—less than they would buy if they were charged the lower, real cost of their consumption. An audience's apparent unwillingness to buy does not necessarily mean that the audience does not want the content in an economically meaningful sense of "want." Rather, this unwillingness only means that the audience does not want the content at the improperly high price at which the profit-oriented or market-disciplined firm must price it. Likewise, negative externalities permit artificially low prices. Purchases of content that have negative externalities do not mean that the audience wants that content—only that it wants the content given that the content is being sold at less than its real cost. And if these externalities are significant, as I will suggest below, "good" content may be priced way too high while "bad" content may be priced way below its actual cost to society.

These are the purely economic observations. Two aspects of most externalities in the media context merit special comment before proceeding. First, these externalities often represent noneconomic values or activities; to think of them as externalities at all seems awkward for those who do not adopt

the pervasive market rhetoric of economic analysis.<sup>68</sup> In my analysis here, since I am critiquing free market analysis on its own terms, I will use this rhetoric, although later I will question its appropriateness. Second, media externalities often involve the system of freedom of expression. Many, probably most, of the media's effects on third parties occur through media content's effect on its audiences' thinking, beliefs, preferences—or, as sometimes described, any harms (or benefits) that result from a “mental intermediation.” Liberal premises arguably embodied in the First Amendment mean that people's admittedly real and legitimate interest in what others read or hear does not give them authority to force these others to read *X* or prohibit them from reading *Y*.<sup>69</sup> Prevention of harm (or achievement of gain) is not always a permissible basis for prohibiting (or mandating) behavior.<sup>70</sup> People may have a First Amendment right to engage in certain forms of harm-causing behavior. Acceptance of this view of the First Amendment, however, would still not stop the state from implementing policies designed to increase positive and to decrease or otherwise respond to negative externalities of media products.

This section considers media content's effect on third parties—costs or benefits to people other than the immediate audience.<sup>71</sup> Although I offer no empirical evidence, I expect my attempt to catalog and describe these externalities, both positive and negative, will provide convincing support for the view that they are massive. If true, markets within an otherwise unchanged legal order cannot be expected to operate efficiently, that is, cannot be expected to provide the audience with what it wants. This discredits the claim that “the fully deregulated marketplace [leads to] the best and highest use.”<sup>72</sup>

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<sup>68</sup> See RADIN, *supra* note 67.

<sup>69</sup> Government decisionmaking based on promoting some people's interest in what other people read has sometimes been considered an improper reliance on external preferences. Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 275–76 (1977). Even if properly characterized as an “external preference,” reliance is proper for some purposes—in fact, it can be central to individual and collective self-determination—but is not proper as a basis for suppressing “others” liberty. See C. Edwin Baker, *Counting Preferences in Collective Choice Situations*, 25 UCLA L. REV. 381, 381–416 (1978).

<sup>70</sup> Cf. C. Edwin Baker, *Harm, Liberty, and Free Speech*, S. CAL. L. REV. (forthcoming 1997) (arguing that prevention of harm or injury to others is virtually never a *sufficient* basis for restricting people's liberty—although emphasizing that this claim is only plausible given particular conceptions of liberty).

<sup>71</sup> From a suitably abstract perspective, the discussion here resembles issues considered in the last section. There, only disablingly high transaction costs blocked price discrimination sufficient to achieve “efficient” outcomes. Still, externalities or third party effects are often commonly recognized and treated separately.

<sup>72</sup> Fowler & Brenner, *supra* note 3, at 211. Of course, regulation or other legal changes can make things worse—dealing with one problem, one externality, often creates other

Here I catalog major positive and negative externalities. In the following subsection, I note illustrative actual or possible legal or policy responses. Most existing and commonly proposed media-specific regulations or “interventions” turn out to be attempts to respond to one or another of these externalities. Therefore, these regulatory actions and related media policies cannot be condemned wholesale on the ground that it would be better to allow the audience to get what it wants. The market cannot be routinely expected to accomplish that goal or to do better by the audience than intelligent regulatory intervention. The question in most cases will be (partly) empirical—what are the externalities, both positive and negative, how important are they, and do particular regulations lead to their “distortive” effect being blunted? The empirical analysis, however, usually cannot be expected to be conclusive. These externalities are not only virtually impossible to measure but often their significance, even their valence, will be disputable. Whether any particular regime gives the audience what it wants will likewise be contestable. Therefore, although empirical information will be helpful, the evaluation is inherently political.

### *A. Catalog*

This subsection describes ten generic types of externalities that greatly affect whether a market production of media content will correspond to the content that would be produced if the audience got what it wanted when charged its real cost. Obviously, there is no natural classification scheme for externalities. Like any classification, only its usefulness for some purpose gives the scheme any value. Here, the constructed classification will be somewhat arbitrary, with categories sometimes overlapping, and the overall scheme inevitably incomplete. Still, it encompasses many, hopefully most, of the third party effects that either do or arguably should impact media policy. In any event, recognizing that the production and distribution of media content affects people other than the immediate, paying audience, I consider ten categories:

1. Quality of Public Opinion and Political Participation
2. Audience Members’ Interactions with Other People
3. Audience Members’ Impact on Cultural Products Available to

Others

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problems; moreover, sometimes regulatory rent-seeking only masks itself in the rubric of the public interest. As long as even the theoretically ideal market can be seen to be inadequate at providing socially desirable results, intellectual and political energy should be spent on improving, not merely disparaging, political and governmental processes—the only realm in which appropriate solutions are possible. That effort, however, is beyond the scope of this Article.



4. Exposing and Deterring Abuses of Power
5. Other Behavioral Responses to the Possibility of Media Exposure
6. Nonpaying Recipients of Information and Media Output
7. Positive Benefits to People or Entities Wanting Their Message Spread
8. Messages' Negative Effects on Those Who Do Not Want the Attention
9. Gain or Loss to Sources
10. Costs Imposed or Benefits Created by Information Gathering Techniques

### 1. *Quality of Public Opinion and Political Participation*

Media consumption often leads people to become more (or sometimes less)<sup>73</sup> informed, as well as more or less active as voters or political participants.<sup>74</sup> The quality and extent of a media consumer's voting and political activity affects other people. Even a person's opinions as measured by polls can influence others' behavior, including decisions of political elites. These political consequences of media consumption constitute a major externality. The symbolic and institutional resources society devotes to maintaining a democracy and trying to make it more vibrant make it clear that many people are committed to (and value) its successful functioning to an extent way beyond their personal concern to have their own opinion or to vote themselves. The extent and quality of people's media consumption greatly affects all third parties who want to live in a well-governed democracy.

More generally, individuals are tremendously benefited or harmed if the country makes wise or stupid decisions about welfare, warfare, provision of medical care, the environment, and a myriad of other issues. Each individual gets the advantage of good policies (and disadvantage of bad policies) depending on the extent and quality of *other* people's political participation. Thus, each person can be tremendously advantaged by other people's media consumption. Collectively, people's media consumption produces huge externalities.

Media can, of course, mislead as well as inform, can present venal as well as wise argument, can encourage bad as well as good values, and can dampen as well as incite political participation. Escapist literature or news that diverts attention away from crucial structural issues and directs it toward trivial events can undermine the quality of politics. Everything from negative political ads, to false information, to demagogic partisanship, can pollute political discussion. In other words, the externalities can be dramatically negative as well as positive. Moreover, often their characterization will be contestable. Not everyone would agree that reading *The Nation* produces good political externalities—just as I have doubts about the benefits of Rush Limbaugh. This contestability does not,

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<sup>73</sup> See Justin Lewis, *What Do We Learn from the News?*, EXTRA!, Sept. 1992, at 16, 17 (publication of Fairness and Accuracy in Reporting) (holding other factors constant, finding heavy viewers of television news less well informed about news than other people); see also BAKER, ADVERTISING, *supra* note 11, at 31–32 (reviewing literature and concluding newspapers, not television, are main source of public's current events knowledge).

<sup>74</sup> See RUY A. TEIXEIRA, WHY AMERICANS DON'T VOTE: TURNOUT DECLINE IN THE UNITED STATES, 1960–1984, at 88 (1987) (stating that decline in newspaper reading can account for two-thirds of net voter decline in 1968 to 1980 and one-third of the socio-economic status adjusted total).

however, lessen the extraordinary importance of these externalities. Although many social scientists and economists prefer looking at empirical situations where the characterization of effects is seemingly unproblematic, even if only by definitional fiat, and where the difficulty is only getting solid data, any honest approach to policy must recognize that the contestability of characterizations does not make the effects any less centrally important.

## 2. Audience Members' Interactions with Other People

The media's impact on political culture is only one of many spill-over effects. It inevitably influences its audience's interactions with third parties, frequently in ways that these others value or disvalue. I will leave until later cases where a specific third party values or disvalues defamatory or laudatory content that portrays her or, alternatively, her competitors.<sup>75</sup> Third parties' self-interested concern with the audience's media consumption extends much more broadly. For example, social science evidence clearly indicates that, at least under existing conditions, media portrayals of violence increase the likelihood that some audience members will engage in violent behavior towards others.<sup>76</sup> Similarly, the image of the world presented by the media influences its audience's behavior in situations ranging from its sexual and intimate interactions to its purchasing behavior to its compassionate responsiveness to other's difficulties. A heavy diet of watching television apparently corresponds to increased fear of the world and reduced willingness to come to the aid of an endangered stranger.<sup>77</sup> People's consumption of some religious, pornographic, advertising, or other materials may contribute to their being more or less appealing romantic or sexual partners—or influence their exercise of power in hiring decisions or assigning jobs. Group defamation can harm those portrayed by influencing audience members' attitudes and then their subsequent behavior

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<sup>75</sup> See *infra* Parts III.A.7, III.A.8.

<sup>76</sup> In a survey of research findings, John Murray observes: "Despite decades of research, there is a perception that the research evidence on television violence is unclear or contradictory. This perception is incorrect." John P. Murray, *The Impact of Televised Violence*, 22 HOFSTRA L. REV. 809, 810 (1992). Murray's conclusion is best summarized by Leonard Eron's testimony to Congress: "There can no longer be any doubt that heavy exposure to televised violence is one of the causes of aggressive behavior, crime, and violence in society." *Id.* at 823; cf. L.A. Powe, Jr. & Thomas G. Krattenmaker, *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123, 1134-70 (1978).

<sup>77</sup> For an early development of this point, see George Gerbner & Larry Gross, *Living with Television: The Violence Profile*, 26 J. COMM. 173 (1976).

toward members of the portrayed group<sup>78</sup>—although an additional concern is obviously the direct injury experienced by members of the audience.<sup>79</sup> Similarly, copy-cat crimes involve a major cost of media content not brought to bear in the media producer's pricing policy; both the First Amendment and difficulties of proof properly conspire to prevent liability and hence internalization.

Media consumption also influences the knowledge and other resources that a person brings to an interaction. A third party will find it is more difficult to discuss the war in Bosnia with someone who has not heard of Bosnia. That is, media consumption influences whether an interaction with another will be experienced as interesting or boring, helpful or unproductive. Starkly put, no one is an island. Among people's most important—dangerous, injurious, fulfilling, challenging—experiences are those they have with others. It matters whether the other is an interesting and insightful conversationalist, a skillful associate, a caring person, or alternatively, a rapist or a bully and a bore—and the other's media consumption influences these characteristics. Their media consumption can have a major positive or negative value for people with whom they interact—value for which these third parties often would, at least in theory and in the absence of transaction costs, be willing to pay to obtain. It is this theoretical willingness to pay that economic analysis must take into account. More broadly, even when it is empirically impossible or normatively inappropriate to attribute responsibility for specific behavior to specific media content, media content undoubtedly contributes significantly to the culture that makes different behavior more or less likely, more or less thinkable, as well as affecting the meaning or significance of that behavior when it occurs. Other than, maybe even more than, its direct value to its audience, this influence on people's "construction of reality" and on the resulting behavior, which affects other people, may be the media's most significant effect.

### 3. Audience Members' Impact on Cultural Products Available to Others

A has an interest in B's media consumption not only because B's consumption affects B's interactions with A, but also because B's consumption affects the media and other goods available to A. B's purchases of particular

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<sup>78</sup> See *Beauharnais v. Illinois*, 343 U.S. 250, 263 (1952).

<sup>79</sup> See Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 457–66. This harm includes the injury to the people disparaged and to those who accept the disparagement—although to the extent members of this second group do not experience this influence as a harm, or at least do not at the time it occurs, how the effect should be characterized by a nonpaternalistic analysis of giving people what they want is ambiguous. See *infra* Part IV.

cultural products—say, rock-and-roll music or opera compact discs or a quality newspaper—increases the demand for media goods of that sort. This increased demand can be beneficial or harmful to *A*. If *A* likes *B*'s favored culture, *A* could be benefited if the increased demand leads this favored culture to become more widely and cheaply available, or harmed if too many *B*s seek the limited number of tickets for live performances.

Here, media content's public good aspect is especially relevant. More demand usually allows spreading the cost of producing media content over more people. Thus, others wanting a person's preferred media content generally makes it more cheaply available. People's cultural preferences are in this way "subsidized" by others having the same preferences. Of course, if a person values not the cultural product itself but rather the cultural product's "eliteness," she could be disadvantaged if her otherwise preferred content becomes cheaper and more widely desired. In either case, however, other people's media consumption has, as an externality, either beneficial or negative effects on her opportunities to satisfy her cultural preferences.

Similarly, media content can affect, positively or negatively, its audience's creativity, productivity, or group identity and diversity. These effects on audience members likewise influence the availability of various options for nonaudience members—cheaper "goods" if the audience becomes more productive, useful or more interesting artifacts if audience members become more creative, and more diverse life options if media nurtures diversity. Alternatively, nonaudience members may have to pay higher taxes for an expanded police-state apparatus if audiences become more dangerous. All these effects occur even for third parties who do not personally interact with those who consumed the influencing media products.

#### 4. *Exposing and Deterring Abuses of Power*

Professor Vince Blasi highlighted the "checking" function of speech and the press as a key rationale for constitutional protection.<sup>80</sup> This function involves both the media's power to expose governmental misdeeds and its ability to deter those misdeeds by increasing the likelihood of exposure. The focus on checking governmental abuse is surely no accident within the constitutional arrangement. Constitutionalizing protection of the press plausibly

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<sup>80</sup> See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 539. Blasi develops the checking function as central to interpreting both the speech and the press clause, but arguably it makes most sense as a reason for and as guidance in an independent interpretation of the Press Clause. See C. Edwin Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819, 819–89 (1980).

follows from recognition of the value of a structure that checks abusive or corrupt uses of governmental power combined with awareness that those to be watched should not be trusted with the power to muzzle the watchdog. Still, the general value of checking corrupt or abusive uses of power applies beyond a concern with government. Wherever power exists, in business for example, the potential of media exposure provides a valuable safeguard.

In one unusual but dramatic example, Amartya Sen argues that no matter how bad the drought, no matter how poor the country, no major famine has ever occurred in a democratically governed country that has a free press.<sup>81</sup> Apparently if there is a press to publicize the existence of the drought and potential famine, the government in any country that subscribes to democratic values and that tolerates competitive, oppositional political parties, which potentially can take advantage of any failure of response, cannot resist the need to respond. If necessary, the government moves food to the stricken region and, more importantly, adopts income (or distribution) policies<sup>82</sup> that assure availability of food to the potentially "starving" groups.

A market cannot be expected to (fully or adequately) bring these "checking" benefits to bear on media decisionmaking. If the press deters misdeeds, everyone positively affected by the absence of the misdeeds benefits. "Deterrence" means, however, that the media has no "exposé"—no product—to sell to its audience and hence no opportunity to internalize the benefits it produces. The deterrence is both a pure positive externality and a pure public good. Similarly, when a press exposé occurs, the public in general, not just the audience that purchases the exposé, benefits to the extent that the exposé stimulates a corrective response by either the wrongdoers themselves or by voters, prosecutors, and others with power. Even for the purchasers of media content, the benefit is largely independent of their purchase. Of course, media enterprises do benefit some from exposés. The long history of chasing the "scoop" makes this clear. Still, even when the media can sell an exposé,<sup>83</sup> these sales will dramatically under-internalize the benefits.

Sometimes journalism is pictured as producing exposés that stir political behavior of readers or viewers or at least sufficiently enflame public opinion

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<sup>81</sup> See Amartya Sen, *Freedom and Needs*, THE NEW REPUBLIC, Jan. 10 & 17, 1994, at 31; Amartya Sen, *The Economics of Life and Death*, SCIENTIFIC AMERICAN, May 1993, at 40.

<sup>82</sup> Sen notes that often areas suffering the most devastating famines export food due to starving groups' lack of income with which to purchase available food stocks. See AMARTYA SEN, POVERTY AND FAMINES 161 (1981).

<sup>83</sup> Given the non-copyrightability of facts, the media entity that uncovers the information often will have to share with other media entities any revenue produced by selling the "news."

that officials undertake corrective responses. This picture may be overly simplistic. An empirical study of investigative journalism found the middle step, the outraged public, to be missing. Investigative reports did produce responses by officials but often the officials planned these responses before the story became public and went forward even if the public largely ignored the story.<sup>84</sup> The speculative possibility is that the press sometimes serves the American political order not so much as the public's informer but rather as a substitute public.<sup>85</sup> On this account, the benefits that the media's investigative work produces may be great but not internalized. A relatively unconcerned public is unlikely to pay much extra for those media reports that lead to correction of corruption or to welfare-serving governmental responsibility. The economic prediction must be that, to the significant detriment of the country, the market will encourage the media to seriously underproduce these benefits. Certainly when investigative reporting serves a deterring function and, as noted above, probably even when it produces exposés that stimulate corrective political responses, the investigative reporting will be undervalued by the market. The public will predictably receive less than they would want if only charged its cost minus the value of the positive externalities received by others.

Market dynamics not only cause an underproduction of these benefits, they also distort their creation. Quality journalism and expensive investigative journalism presumably perform the "checking function" better than slipshod, under-funded, or nonexistent journalism. Nevertheless, the gain that the media firm receives is directly related not to the quality or importance of the "checking" effects but to the cost of its production and to its appeal to an audience. The result is that the value of exposés to the media will not correlate with their value to society. The corruption leading up to the savings and loan scandal was just not as sexy as exposés about Gary Hart or Bill Clinton's actual or alleged sex life. The country's comparative over-emphasis on street or violent crime as compared to environmental or bureaucratic crime and misbehavior reflects in part the comparative expense of producing the reports and their comparative expected sale value. Predictably, those exposés most tantalizing or narratively accessible to a broad audience and cheapest to assemble will be comparatively overproduced. The much-praised *60 Minutes* overtly illustrates this dynamic, with segment combinations chosen in part to

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<sup>84</sup> See DAVID L. PROTESS ET AL., JOURNALISM OF OUTRAGE 18 (1991).

<sup>85</sup> Schudson argues that "[s]o long as information is publicly available, political actors have to behave as if someone in the public is paying attention." MICHAEL SCHUDSON, THE POWER OF NEWS 25 (1995). He explains: "The news constructs a symbolic world that has a kind of priority, a certification of legitimate importance." *Id.* at 33. Maybe it should not be so surprising if reporters "often act as if their real audience is made up of the other reporters or government officials they consider their peers." FALLOWS, *supra* note 32, at 240.

give a balance of audience-maximizing appeal, and individual stories chosen (and distorted) depending on the show's ability to make them accessible without too much of an expenditure of resources.<sup>86</sup> Other recent magazine-style television journalism profits by even more overt emphasis on sensationalist exposés, thereby heightening the misallocation of journalistic resources. Of course, this observation does not condemn those formats. Rather the point is that media firms, which do not fully capture the positive benefits of investigative journalism, will disproportionately underproduce the most valuable investigative material.

### 5. Other Behavioral Responses to the Possibility of Media Exposure

The possibility of media coverage has consequences way beyond deterring misdeeds. Potential subjects of media exposure often change their behavior in light of the possible coverage. Demonstrators sometimes choose and time expressive activities intended to stimulate media coverage or select behavior because they believe the activity will play favorably under a media spotlight.<sup>87</sup> Some commentators argue that a primary incentive for terrorist activities is the hope for media exposure.<sup>88</sup>

Press coverage can change content and sometimes the outcome of debate by legislators or other office holders. Apparently, at some point in the nineteenth century, members of Congress stopped addressing each other in their debates as much as they addressed their constituents.<sup>89</sup> Of course, given that media coverage has effects, the question remains whether the predictable consequences will be good or bad. The possibility of being "on the record" changes expressive forms and possibly substantive outcomes. The media, however, has little incentive to take account of whether or when these various behavioral consequences of media coverage are positive or negative (*i.e.*, costs or benefits) because these effects are "external" to their market-based decisions.

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<sup>86</sup> Fallows argues that among the ways distortion enters in is that the producers cannot devote too much time of prominent screen journalists, people like Mike Wallace, to fully understanding a story because of the overpayment of these media stars. *See FALLOWS, supra* note 32, at 57-60.

<sup>87</sup> *See* TODD GITLIN, *THE WHOLE WORLD IS WATCHING* 78-123 (1980).

<sup>88</sup> *But see infra* note 151.

<sup>89</sup> *See* THOMAS C. LEONARD, *POWER OF THE PRESS* 91-96 (1986).



## 6. *Nonpaying Recipients of Information and Media Output*

A profit-oriented enterprise's decisions to produce and sell some media content will often depend on its ability to require those who receive and value the content to pay. To the extent that the enterprise cannot force payment, the result will be underproduction of what people want. However, people often avoid paying. First, they effectively receive media content through their interactions with audience members who have paid. For example, one may ask: "Joe, what of interest was in the paper today?"<sup>90</sup> Second, they gain access to abandoned copies of the media content or, like library users, are free-riders on shared provision of content.<sup>91</sup> These possibilities further illustrate media content's public good character. In any event, a major benefit produced by sale of media content is access gained by many nonpurchasers. Depending on the quality of the content (e.g., its accuracy or importance) as well as its value to the nonpurchaser, this access can be a significant positive (or negative) externality.

The dimensions of this phenomenon sometimes follow predictable patterns. For example, the number of readers of an abandoned newspaper generally goes up during hard times. It is often larger in comparatively poor communities.<sup>92</sup> To the extent that this context produces comparatively more positive externalities, the market is likely to especially underproduce content valued by the poor, even from the perspective of a standard that already disadvantages the poor—willingness and ability to pay.

Another important category of nonpaying (or under-paying) users is content creators themselves. Even if they pay for a "copy" of a work, they frequently do not pay the full value of integrating it into their own subsequent works. Almost any "valuable" communicative content (whether or not commercially

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<sup>90</sup> If "Joe" values his conversation with nonaudience members, he may have compensated the media producer for the value that he, but presumably not his interlocutor, receives from the interaction—although the value he receives may also turn out to be an aspect of the consumer surplus that played a central role in the reasons for underproduction discussed in Part I.

<sup>91</sup> Library users (and other cases of shared use), however, may represent a form of price discrimination that is crucial for publication of many books.

<sup>92</sup> The typical English national newspaper in the 1970s had two to three readers per copy; in contrast, radical working-class papers in the 1830s are thought to have had roughly 20 readers per copy while at mid-century the more expensive stamped radical papers may have been read by 50 to 80 persons per copy. See James Curran, *Capitalism and Control of the Press, 1800–1975*, in *MASS COMMUNICATION AND SOCIETY* 195, 202 (James Curran et al. eds., 1977). A major question, relevant especially for determining advertising rates, is the typical readership of modern papers, with paid papers often asserting that they obtain a much higher readership per copy than free weeklies. See BOGART, *supra* note 62, at 54–55.

created) becomes subject to “appropriation” by later content creators—appropriated in the sense of being the subject of comment, parody, or integrative use. All cultural creations as well as conversation—think of how intimates’ private conventions grow out of their prior interactions—use prior cultural inventions as their building materials. For this reason, legal devices like copyright are always janus-faced—providing an incentive for creation by giving creators some, but inevitably only a fraction, of the value of their creations but also “inefficiently” restricting further creative uses by restricting the materials’ cultural availability. Standards like copyright’s “fair use” permission are at best rough compromises between these two conflicting goals, both of which must be fully served in order to effectively encourage efficient media production.

### *7. Positive Benefits to People or Entities Wanting Their Message Spread*

Publicity creates or blunts demand for objects, activities, or persons. It can stimulate or discourage acceptance of values. The media help create celebrities and pariahs. A media review can foster or hamper the economic success of a restaurant, a movie, or virtually any other product. Individuals, advocacy groups, governments, and businesses often desperately seek the media’s favorable attention, while disvaluing having their message ignored, distorted, or critiqued. Here, I will consider cases where people value media attention, leaving the converse to the next heading.

Frequently people or entities pay directly for favorable presentations about themselves, their products, or the views they hold. Favorable content is typically called “advertising” if direct payments are implicitly admitted, or called “corruption” of the media if direct payments are made for content that purports to be the media’s own editorial content.<sup>93</sup> Beneficiaries also often pay the media indirectly, although overtly paying the public relations industry. Here, their payment to the media enterprise can take the form of making it cheaper for the media to gather and use (favorable) information. The person or entity provides press facilities, news conferences, press releases, video news releases, and other similar materials and services.<sup>94</sup>

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<sup>93</sup> See 47 U.S.C. §§ 317, 508 (1994) (requiring announcement whenever payment is made to secure broadcast); *Lewis Publ’g v. Morgan*, 229 U.S. 288, 314–16 (1913) (upholding requirement that newspapers receiving second class mail privileges identify as advertising any material published for compensation); *SEC v. Wall St. Publ’g Inst.*, 851 F.2d 365, 376 (D.C. Cir. 1988) (upholding law requiring disclosure of fact and amount of consideration paid by issuer of security to a person for presenting a description of the security).

<sup>94</sup> The FCC has struggled with the question of whether rules regulating advertising apply when a toy manufacturer “gives” a network cartoon programming that features characters that

Often, however, the media bestows major positive benefits—favorable reporting about a person, group, place, or product—without either direct or indirect payment by the beneficiaries. These significant gratuitous benefits are a major plus for these groups and individuals—a positive externality of media content that is not internalized into the media's decisionmaking.

#### *8. Messages' Negative Effects on Those Who Do Not Want the Attention*

Media attention can also harm individuals, groups, or entities. Either accurate or inaccurate information, either fair or unfair comment, can ruin a restaurant or politician. The market does not routinely bring these harms to bear on the media's editorial decisions. Of course, the situation is different if the media has transactions with the negatively described (or potentially described) person or entity. Implicit or explicit bargains are then much simpler. The journalist can offer to keep the source confidential. It can soften or avoid the negative portrayal of its important advertisers who make payments for ads, or of government officials or agencies which regularly provide information and access. Nevertheless, for the media to explicitly accept payment for not running or for changing a story is typically characterized as corrupt. An "independent" press is not supposed to engage in such transactions.

Theoretically, media companies could partially internalize costs imposed by its unwelcome portrayals. A media entity could compare the value the injurious content adds to its journalistic product with the amount the negatively portrayed party would pay to exclude the content. Unless charging for not running the content is illegal (for example as "blackmail"), the media entity could then choose the most profitable course. Nevertheless, actual journalistic practices (possibly because of high transaction costs or the value of the media entity's reputation for independence) usually rule out these transactions. The predictable failure of the market to lead the media to internalize these costs imposed on the subjects of its news apparently makes the news "inefficiently" negative—more negative than if the audience paid the full cost of the news.

Still, distinctions between different negative portrayals (for example, between accurate and inaccurate portrayals or between accurate newsworthy and accurate nonnewsworthy portrayals) are important. Media entities have incentives to avoid inaccurate portrayals. Their audience may pay less for poor quality information. This incentive, however, only internalizes one cost created by the "bad" information—the cost borne by the audience, not the additional

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the manufacturer markets. See *In re Policies & Rules Concerning Children's Television Programming*, 6 F.C.C.R. 2111 (1991); NEWTON N. MINOW & CRAIG L. LAMAY, *ABANDONED IN THE WASTELAND* 21 (1995).

harm to the person or entity described. This market failure might be partially remedied by, for example, defamation and privacy tort law. Distributive or fairness considerations, however, may argue that the media usually should not be deterred from presenting accurate information. Negative effects of accurate information are a real externality. However, not internalizing these effects may help achieve the result that would occur if the media entity could internalize various, uncaptured positive externalities, for example, checking function gains created by the accurate information.

One particular response to potential noninternalized negative effects merits particular attention. Many groups—both private and governmental—have an interest in the public only receiving sanitized news concerning their activities. They can advance this goal by collecting and writing their own sanitized accounts and then distributing these accounts as press releases. The media enterprises then sell this freely obtained content to audiences, possibly because audiences do not know what they are getting or, equally relevant for the current point, because audiences just do not value greater accuracy (as to these issues) enough to pay the added cost of more investigative journalism. In other words, public relations, discussed above as a means to obtain positive portrayals, can also be a means to implicitly pay the media for avoiding negative portrayals.

Thus, “press release” journalism reduces a negative externality created by negative portrayals. Nevertheless, the result can be “inefficient,” as well as otherwise objectionable. It is inefficient, for example, if the practice prevents the production of positive externalities such as those associated with the “checking function.”<sup>95</sup> If the media entity were able to capture these positive externalities, “real” journalism might be more profitable than press release journalism. Not internalizing these negative externalities might be a second best result—better than counting them when the positive externalities are not counted.

### 9. *Gain or Loss to Sources*

Sources stand to gain from their interactions with reporters. They may obtain desired publicity for their views or their disclosures, desired personal recognition or status, a sense of empowerment, or a route to future media access. There are also potential costs—the source may be injured through retaliation or embarrassment if her identity is disclosed. The reporter and, subsequently, the publisher or broadcaster generate these costs or benefits in exchange for information that, depending on its quality, may benefit the media entity by giving it a better product to sell—broadcast or publish—to a public.

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<sup>95</sup> See *supra* Part III.A.4.

Even if no cash is involved (and sometimes it is), as with any voluntary exchange, these mutual benefits should usually lead to efficient results. Thus, here, reliance on the market is presumptively justified.<sup>96</sup> Still, this dyad merits special attention.

Any failure to obtain “efficient” levels of disclosure might be expected to result from legal blockages of opportunities to enter into binding agreements between sources and reporters. Such a blockage might reduce the availability of information from sources. But consider two examples, one where the government forces the press to break its promise, and the other where it forces the press to keep the promise.

Being able to promise anonymity helps a reporter “pay” for information—the media internalizes one of the source’s potential costs. The government’s claimed right to demand that a reporter testify and expose the source<sup>97</sup> limits the reporter’s ability to give persuasive assurances, thereby reducing the availability of information.<sup>98</sup> The blockage arguably leads to an inefficient reduction in news production. Of course, a reporter’s privilege could be seen as subsidizing the press. It grants the reporter a right, a resource, not given to other members of society. Thus, the question might be whether society wisely grants this subsidy. However, the reporter possesses the information only because of engaging in the reporting business. In that role, the reporter, unlike most members of society, works to create a value in the ability to offer anonymity. Moreover, to the extent that freedom of the press represents a commitment to protect this business, a plausible view of the baseline is that the information about the source’s identity is created by and belongs to the “press.”<sup>99</sup> Recognizing a reporter’s “special” testimonial privilege is not giving the press something that otherwise was the government’s; the privilege only means that the government does not take something that the press itself produces. The privilege makes it more likely that the press, without imposing on anyone a cost related to gaining this information, is better able to produce socially valued information.

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<sup>96</sup> Of course, sources will sometimes later regret the interchanges, but that is often true after the fact for buyers or sellers. Still, the presumption might be that sources who willingly make disclosures are adequately compensated, subject to typical “efficiency” doubts surrounding contract behavior. For example, how should one party’s woeful lack of information or power affect the analysis of the transaction? This caveat suggests examining the rationale for restrictions on free trade built into professional norms.

<sup>97</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 690–91 (1972).

<sup>98</sup> See Vince Blasi, *The Newsmen’s Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 262 (1971).

<sup>99</sup> See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 242–49 (1989).

Likewise, a simplistic economic analysis might suggest that damages for a breach of a promise of confidentiality should be available.<sup>100</sup> The argument is that the availability of contract provides the news organization an ability to give the source something valued by the source and thereby enables the press to obtain information that it otherwise would not get. Forbidding such damages because, for example, they involve liability for truthful publication of information,<sup>101</sup> would inefficiently lead to reduced production of news. A more textured account, however, must consider the effect of the damage remedy on journalistic practices and on the *quality* of information produced.<sup>102</sup> For example, would potential liability lead media enterprises to centralize more power in editors as opposed to reporters? If so, what effect would this centralization have on the quality of news produced? Or does the unavailability of liability disempower journalists as opposed to editors, for example, in the decision about whether to publish the source's name?<sup>103</sup>

If, as seems probable, the circumstances in which the source is most likely to demand a *legally binding* promise are those in which the media firm is most likely to want to breach the promise, and if this happens mostly where the press concludes that the identity of the source is itself important news (for example, because it shows that the source attempted to manipulate the press into publishing misleadingly negative information about a political opponent)<sup>104</sup> the analysis shifts. Non-enforceability may lead primarily to a decrease in the publication of misleading or "corrupt" information, while enforceability may discourage publication of politically relevant and true exposés about sources who unethically try to manipulate the media. If so, then non-enforceability would improve the "quality" of information made available to the public. Once the negative externalities of "bad" information are taken into account, the economic analysis that merely looked at "quantity" is seen as unwisely

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<sup>100</sup> See Joseph H. Kaufman, *Beyond Cohen v. Cowles Media Co.: Confidentiality Agreements and Efficiency Within the "Marketplace of Ideas,"* 1993 U. CHI. LEGAL F. 255, 259-68; *The Supreme Court, 1990 Term—Leading Cases*, 105 HARV. L. REV. 177, 277-87 (1991).

<sup>101</sup> See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 673 (1991) (Blackmun, J., dissenting).

<sup>102</sup> The best treatment, suggestive on points made below, is Lili Levi, *Dangerous Liaisons: Seduction and Betrayal in Confidential Press-Source Relations*, 43 RUTGERS L. REV. 609 (1991).

<sup>103</sup> See Jerome A. Barron, *Cohen v. Cowles Media and its Significance for First Amendment Law and Journalism*, 3 WM. & MARY BILL RTS. J. 419, 452-56 (1994). Note the exercise of this power by the editor can hurt the journalist by limiting her future effectiveness to the extent she then has a bad reputation among various potential sources.

<sup>104</sup> Cf. *Cohen*, 501 U.S. at 670, which is criticized in Baker, *Turner Broadcasting*, *supra* note 11, at 119-22.

simplistic. Audiences *may* be benefited by making these promises unenforceable if the result is that “bad” information is less prominent. Merely relying on the market cannot be said here to be clearly the best way of giving the audience what it wants.

### 10. *Costs Imposed or Benefits Created by Information Gathering Techniques*

The journalist’s activity of gathering information itself sometimes creates benefits or, more often, imposes costs. The “speeding” reporter may damage property or injure people in a rush to obtain a story. Likewise, a reporter’s presence and her questioning may intrude into privacy or interfere with personal, business, or political relationships. When a reporter barges in to be the first to interview the crime victim, it can be painfully intrusive,<sup>105</sup> whether or not later publication occurs, with the publication being a potentially additional upsetting invasion.

People who know they are being recorded, especially if they know they are being recorded on audio or video tape by the press, will often change their behavior from that which they would otherwise prefer—a fact apparently assumed, for example, by the many laws forbidding recording of conversations without the consent of all participants.<sup>106</sup> This change is presumably a cost to those who did not wish to change and did not wish to be recorded, but can be either a benefit or cost to others who may or may not prefer the changed behavior. The mere presence of reporters can negatively affect the content and openness of discussion at a board meeting or among a group of people trying to decide how to respond to some issue. Televising a trial might affect a jury’s attention or attitude toward the case; certainly the received view is that televising jury deliberations would be inappropriately intrusive and probably distortive. Alternatively, the mere presence of reporters or news gatherers can be beneficial. “On the record” discussions may be fairer or wiser in their

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<sup>105</sup> Consider a reporter who, after a mother kills her two young children and then herself, goes next door with camera rolling and, knowing that the parents are not at home, tells the murdered children’s young playmates about what happened in order to get their reaction on film. See *KOVR-TV, Inc. v. Superior Court*, 37 Cal. Rptr. 2d 431, 432–33 (Cal. Ct. App. 1995).

<sup>106</sup> The federal government bars recording of conversations unless one party consents, see 18 U.S.C. § 2511 (1994), but some states bar taping unless all parties consent. Some constitutional challenges claiming interference with news gathering in particular contexts have been upheld, but more often are rejected. See FRANKLIN & ANDERSON, *supra* note 56, at 408–11, 581–82.

output. More dramatically, a reporter's presence can provide an unpopular group increased safety or an activist organizer increased status.<sup>107</sup>

Sometimes on-going relationships between a reporter and her subjects, rights of exclusion implicit in ownership of private property, or other unique features of situations allow rough internalization of many effects of the activity of news gathering. Still, the media typically will not pay the full costs or receive the full benefits of news gathering, and this underpayment will have consequences. Audiences will receive more content than they would if they paid its real cost when the news gathering itself imposes costs for which the media does not pay. However, they receive the reverse, less content than they should, when the reporting creates benefits, for example, better conduct of public affairs or safety for dissidents. Moreover, the distortion is biased in particular ways, possibly towards sensationalism and away from public affairs and dissent.

## B. Policy Responses

The economic language of "externalities" is usually absent from popular discourse about media policy. Yet it is uninformative to rely on a faith in markets or to use economic analysis to argue for deregulation without including consideration of these externalities. Once this consideration is included, it becomes apparent that most existing media law, as well as most policy advocacy about legal policy in the media context, can be understood as attempting to reduce costs not otherwise borne by the media, to impose those costs on the media, or to promote provision of content otherwise inadequately produced because of the media's inability to internalize the benefits. That is, the legal and policy realm can be understood as responsive, and should be even more responsive, to the externalities cataloged here, thereby making the media come closer to giving the audience what it wants. Here, I offer a sampling of illustrations of this claim.

### 1. Responses to the Media's Effect on Political Culture

The content and quality of people's political participation<sup>108</sup> is a major concern of media policy. The First Amendment strictly limits governmental authority to restrict content because of its assertedly negative effects. Any system that respects people's agency or the institutional integrity of the press

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<sup>107</sup> Safety was sometimes a reason for Black Panther groups to permit a reporter to be present at times of expected police raids. Cf. *Branzburg v. Hayes*, 408 U.S. 665, 672 (1972).

<sup>108</sup> See *supra* Part III.A.1.



rules out most such governmental restrictions. Thus, the Supreme Court unanimously struck down a prohibition on newspapers' election day endorsements, a state law purportedly justified as preventing powerful unanswerable distortions of the political process.<sup>109</sup> However, laws sometimes restrict politically relevant speech of entities whose "agency" or liberty has no moral claim to respect. Participation of these entities within the political culture can be seen as distortive rather than contributory.<sup>110</sup> Likewise, free speech doctrine permits various restrictions on knowing falsehoods that reduce the quality of political information.<sup>111</sup>

Even if most restrictions on speech reasonably viewed as having negative political externalities are considered unconstitutional, the government often promotes content expected to have broadly positive political externalities. Newspapers' predicted positive influence on political knowledge was invoked as a primary justification for the huge mail subsidy newspapers have received since colonial times—subsidies often paid for by postal charges imposed on other "speakers," usually first class letter writers.<sup>112</sup> More modern examples

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<sup>109</sup> See *Mills v. Alabama*, 384 U.S. 214, 220 (1966); see also *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 838 (1978) (protecting publication of truthful information regarding confidential Judicial Inquiry and Review Commission proceedings). Before the development of modern First Amendment jurisprudence, prohibitions that often served very partisan positions were constitutionally much less problematic. See *Patterson v. Colorado*, 205 U.S. 454, 463 (1907) (Holmes, J.) (upholding contempt citation of newspaper for publishing political cartoons and denying the paper an opportunity to defend by proving truth).

<sup>110</sup> Laws restricting corporate political contributions were widely adopted during the Progressive era in the early twentieth century, in large part because they were thought to represent corrupting profit-oriented concerns rather than people's political sentiments or principles. See *United States v. UAW*, 352 U.S. 567, 570–75 (1957) (discussing history of restrictions on corporate political contributions); LOUISE OVERACKER, *MONEY IN ELECTIONS* 177–88 (1932); EARL R. SIKES, *STATE AND FEDERAL CORRUPT-PRACTICES LEGISLATION* 108–13 (1928). These laws are apparently constitutional. Compare *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (upholding statute prohibiting corporations from making independent expenditures on behalf of political candidates from corporate treasury), with *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 795 (1978) (striking down statute prohibiting corporations from making expenditures to influence the outcome of referendum not affecting property, business, or assets of the corporation).

<sup>111</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

<sup>112</sup> See RICHARD B. KIELBOWICZ, *NEWS IN THE MAIL: THE PRESS, POST OFFICE, AND PUBLIC INFORMATION, 1700–1860s*, at 20–24 (1989). The political power of newspapers may have led to subsidies, especially within postal policy—many early postmasters were newspaper publishers. Originally, in addition to newspapers, the more common users of the mail were apparently other businesses, not individuals engaged in noncommercial communications. Hence, these other businesses probably paid most of the newspaper subsidy.

abound. Government actions that help make media content more cheaply and plentifully available to the public include provision of public libraries, expenditures on public broadcasting, allocation of certain electromagnetic radio frequencies to broadcasting as opposed to solely military uses, allocation of some of these broadcast frequencies to public broadcasting rather than commercial broadcasting, grants for producing art and cultural materials and for making them publicly available, and government printing and free or below cost distribution of information. The government also subsidizes information development, for example, research within universities, within government agencies, and by specific government contract, although often these expenditures have aims unrelated to improving the political culture. The government indirectly subsidizes the press and the development of political information by issuing press releases and by providing press facilities for accessing portions of the political sphere. The Freedom of Information Act mandates that lots of expensive-to-create information be made available on request.<sup>113</sup> Moreover, the charges for finding (as opposed to duplicating) the information are dropped for the media and sometimes for various nonprofit organizations, and even duplication charges are waived or reduced when making the information available serves the public interest.<sup>114</sup>

Content subsidies are only one possible policy for promoting positive political externalities. A quite different approach involves influencing the structure of the media industry and the distribution of ownership of, or decisionmaking control within, media entities. Different structures and distributions allow control by different sorts of people who may have predictably different incentive structures. They may differ from current owners and decisionmakers in the priority they place on the following: public service ideals; professional norms; influencing political outcomes; serving particular geographic, identity, or interest based communities; and maximizing profit. These differences are especially important in an industry that constantly struggles with a tension between profit maximization and creative, professional, and public values—a tension that can be redescribed in part as a tension between producing more negative or more positive externalities. A profit-maximization focus is unconcerned with negative externalities—costs that do not take money away from the enterprise. In contrast, public service ideals,

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Providing socially valuable information also helped justify eventually extending mail subsidies to magazines but not to “advertising papers,” which policymakers perceived as serving only private concerns. See Richard B. Kielbowicz, *Origins of the Second-Class Mail Category and the Business of Policymaking, 1863–1879*, 96 JOURNALISM MONOGRAPHS 1, 4, 13, 20 (1986).

<sup>113</sup> See 5 U.S.C. § 552 (1994).

<sup>114</sup> See *id.* § 552(a)(4)(A)(ii)(II), (iii).

professional norms, and various other non-profit-based incentives typically amount to standards for, or goals of, reducing negative or producing certain positive externalities. For these reasons, a public policy concerned with giving the audience what it wants should aim at promoting structures and distributions that give authority to the sorts of people less dominated by a profit focus and more oriented toward maximizing social value.

A standard justification for antitrust rules is that monopolies inefficiently reduce production. In the media context, the reduction to some extent denies the audience what it wants. The political culture externality provides, however, major additional "economic" reasons to engage in structural regulation that go far beyond traditional antitrust concerns. For example, Sweden targeted its newspaper subsidies to maintain or increase newspaper competition. Like many other democracies, it believed this competition contributes to the quality and vitality of a democratic political culture.<sup>115</sup> Similarly, this country's Newspaper Preservation Act,<sup>116</sup> however inept at achieving its ends, was presumably oriented in part towards this end.

Implicit in the assumed tension between maximizing profits and maintaining journalistic standards is that the second contributes more to a desirable social and political order. The increasing dominance of a bottom-line orientation purportedly damages the informing as opposed to the entertaining role of the media, especially of the news.<sup>117</sup> A plausible hypothesis, subject to investigation, is that different ownership structures lead to differing trade-offs between these two demands. Some research indicates, and many editors and media professionals believe, that profit considerations are less dominant in independent than in chain-owned newspapers.<sup>118</sup> Possibly people closer to actual journalistic practice will have the greatest commitment to journalistic standards, largely out of personal and professional pride. Local owners may

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<sup>115</sup> See KARL ERIK GUSTAFSSON & STIG HADENIUS, SWEDISH PRESS POLICY 78 (1976); Goran Hedebro, *Communication Policy in Sweden: An Experiment in State Intervention*, in COMMUNICATION POLICY IN DEVELOPED COUNTRIES 137 (Patricia Edgar & Syed A. Rahim eds., 1983); Lennart Weibull & Magnus Anshelm, *Indications of Change: Developments in Swedish Media 1980-1990*, 49 GAZETTE 41 (1992).

<sup>116</sup> Newspaper Preservation Act, Pub. L. No. 91-353, 91 Stat. 353 (1970).

<sup>117</sup> See, e.g., BOGART, *supra* note 32, at 174-75; DOUG UNDERWOOD, WHEN MBAS RULE THE NEWSROOM 59-66 (1993).

<sup>118</sup> See, e.g., Baker, *supra* note 61, at 9-12 (review of literature); William B. Blankenberg & Gary W. Ozanich, *The Effects of Public Ownership on the Financial Performance of Newspaper Corporations*, 70 JOURNALISM Q. 68, 70-71, 74 (1993); John Busterna, *How Managerial Ownership Affects Profit Maximization in Newspaper Firms*, 66 JOURNALISM Q. 302, 302, 307, 358 (1989); David Pearce Demers, *Corporate Structure and Emphasis on Profit and Product Quality at U.S. Daily Newspapers*, 68 JOURNALISM Q. 15, 23 (1991).

have commitments to their community as well as to profits. In contrast, those farther removed (and those not coming out of journalistic culture) will take a more single-minded interest and possibly even an entrepreneurial pride in bottom-line success.<sup>119</sup> If so, positive externalities should increase (holding other factors constant) as ownership (or control)<sup>120</sup> moves from conglomerates (especially conglomerates not headed by journalistic professionals)<sup>121</sup> to independent, often family, ownership, or possibly better, to journalists themselves.<sup>122</sup>

Many media-specific legal rules attempt to discourage concentration and increase control at the local level. Going beyond antitrust rules, the FCC long restricted a single enterprise's total ownership of broadcast stations as well as restricting cross-ownership of various types of media outlets within a single community.<sup>123</sup> The FCC's chain broadcasting rules attempted to keep ultimate

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<sup>119</sup> See, e.g., *Cereal Killing*, THE NEW YORKER, July 24, 1995, at 4 (discussing the closing of *New York Newsday* by the former General Mills executive put in charge of *Times Mirror*).

<sup>120</sup> Both legal and customary factors could cause control to diverge from ownership and even to devolve lower down the corporate structure, moving from central management to editors or journalists. The extent and nature of employee associations, of unionism (and hence of labor law), and the content of contract and corporate law will significantly affect the locus of actual control. Sensitive attention to this is crucial for intelligent media policy. For example, Jerome Barron based his analysis of *Cowles Media* in part on how the decision would affect decisionmaking control within media organizations. See Barron, *supra* note 103; see also Gail L. Barwis, *Contractual Newsroom Democracy*, 57 JOURNALISM MONOGRAPHS 1 (1978).

<sup>121</sup> Warren Phillips, former editor and CEO of the *Wall Street Journal*, spoke with pride about the importance his organization placed on having the publisher and CEO traditionally coming from the journalist rather than the business side of the company. Interview with Warren Phillips, CEO, *Wall Street Journal* (Fall 1992); see also Bill Kovach, *Big Deals, with Journalism Thrown in*, N.Y. TIMES, Aug. 3, 1995, at A25. C.K. McClatchy, a respected former editor and head of a newspaper chain argued that "good newspapers are almost always run by good newspaper people; they are almost never run by good bankers or good accountants." C.K. McClatchy, *How Newspapers Are Owned—and Does It Matter?*, at 8 (Press Enterprise Lecture Series No. 23, 1988).

<sup>122</sup> See Werner J. Severin, *The Milwaukee Journal: Employee-Owned Prizewinner*, 56 JOURNALISM Q. 783 (1979).

<sup>123</sup> These media-specific concentration rules have been routinely upheld when challenged in court even though some place restrictions on constitutionally favored media entities, such as newspapers, that are not imposed on nonmedia businesses. The Supreme Court also allowed the FCC to distinguish among newspapers, requiring divestiture of their local broadcast licenses in 16 "egregious" cases, but not in others. See *FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775, 793 (1978); see also *United States v. Storer*

decisionmaking power over as well as responsibility for broadcast content in the hands of the local broadcaster rather than the networks.<sup>124</sup>

Unfortunately, many of these restrictions have been either abandoned or eased due to deregulatory attack. Possibly because of policy lapses, other rules (*e.g.*, inheritance tax laws and corporate tax rules in relation to newspaper ownership) have in the past encouraged concentration.<sup>125</sup> In the early 1930s, corporate lobbying power prevailed over popular expressions of policy sentiments, with the result that government policy favored corporate commercial interests in their battle with existing and potential noncommercial users for control over broadcasting.<sup>126</sup> The United States, like virtually all democratic countries, has long been concerned with media concentration.<sup>127</sup> Many policies, including FCC ownership rules, have restricted ownership concentration. Still, corporate interests continually push to have these limits lifted. In a lengthy report initiated during the Bush Administration, the Department of Commerce argued in 1993 in favor of legal changes that would stimulate greater concentration of media ownership.<sup>128</sup> Likewise, although President Clinton and others resisted more dramatic cuts, the Telecommunications Act of 1996 substantially reduced limits on media combinations.<sup>129</sup>

Still, the ubiquitousness of industry's ability to misdirect governmental policy should not lead to forswearing governmental involvement. As a rule, governmental structural intervention, when it occurs, has been beneficial. From a historical perspective, industry victories typically occur in the following situations: where, like the initial governmental structuring of broadcasting, some type of governmental intervention is universally seen as necessary and, therefore, the struggle must be over the content of regulation; where the victory involves defeating attempts at useful intervention; or where it eliminates

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Broad. Co., 351 U.S. 192, 203 (1956) (upholding national concentration limits on broadcast licenses).

<sup>124</sup> See *National Broad. Co. v. United States*, 319 U.S. 190, 224–27 (1943) (upholding rules against statutory and constitutional challenge).

<sup>125</sup> See JAMES N. DERTOUZOS & KENNETH E. THORPE, *NEWSPAPER GROUPS: ECONOMIES OF SCALE, TAX LAWS AND MERGER INCENTIVES* 55–87 (1982). One policy justification for recent changes in inheritance laws was to reduce the pressure on families to sell their media properties. See *id.* at 72–75.

<sup>126</sup> See ROBERT W. MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL OF U.S. BROADCASTING, 1928–1935*, at 121–50 (1993).

<sup>127</sup> See, *e.g.*, THE COMMISSION ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS* 79–80 (1947).

<sup>128</sup> See U.S. DEP'T OF COMMERCE, *supra* note 5, at 124.

<sup>129</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

beneficial current regulation.<sup>130</sup> Beyond the examples of media-specific interventions noted above, more dramatic policies aimed at beneficial structural changes in media control are possible. Ben Bagdikian is one among many who argue for the benefits of journalistic employees electing (or having some role in choosing or dismissing) their editors.<sup>131</sup> Law could either require or provide incentives for this arrangement. Legislation could forbid the purchase of existing media entities except by individuals or by legal entities for whom the purchased media entity would be its primary business.<sup>132</sup> This would end the century's long trend toward greater media concentration and would encourage ownership by the people who work in the enterprise. James Curran persuasively argues that effective performance of the media's multiple political and cultural roles requires a mixed system, with public policies designed to encourage different forms of ownership and control.<sup>133</sup>

The list of possible subsidy and structural policies responsive to the political culture externality could go on and on, and each will be subject to numerous (but only sometimes persuasive) objections. Nevertheless, past and current examples of such legally implemented policies show that this country, in accord with all other western democracies, has never thought that reliance on the market alone is adequate. Rejection of a pure market process implicitly reflects an understanding that media potentially create significant positive political externalities.

## 2. Responses to Other Externalities

Media consumption influences its audience's behavior. Other people positively or negatively value that behavior. This situation is the focus of the second and third externalities cataloged above—audience members' interaction with other people and audience members' impact on the cultural products available to others.<sup>134</sup> If the content of a person's media consumption results in her becoming a stimulating conversationalist or a murderer, her friends or victims are affected. Actual and possible policy responses are abundant. Most

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<sup>130</sup> This explains why the fact that corporate special interest groups usually have sufficient political power to obtain policies that sacrifice the public interest should not motivate an interpretation of the First Amendment that keeps government out of the arena of press policy. See Baker, *Private Power*, *supra* note 11, at 432 (arguing that courts have properly rejected this approach to the Press Clause).

<sup>131</sup> See BEN H. BAGDIKIAN, *DOUBLE VISION* 239 (1995).

<sup>132</sup> See C. Edwin Baker, *Mergerphobia*, 257 *THE NATION* 520, 521 (Nov. 8, 1993).

<sup>133</sup> See James Curran, *Mass Media and Democracy Revisited*, in *MASS MEDIA AND SOCIETY* 81 (James Curran & Michael Gurevitch eds., 2d ed. 1996).

<sup>134</sup> See *supra* Parts III.A.2, III.A.3.

of the subsidy and other strategies discussed in relation to political culture apply here. Given the reasonable belief that mass media's emphasis on gratuitous violence and sex reflects bottom line judgments of corporate executives more than autonomous or creative choices of writers and producers, and given that these emphases, or at least the emphasis on violence,<sup>135</sup> interact with other aspects of culture and personality to increase the likelihood that a viewer will engage in violence, a shift in ownership or decisionmaking control to the media professionals could lead to better media products with fewer negative externalities. Media subsidy programs can benefit nonaudience members by supporting media that have positive cultural and educational effects on audiences. Although there is not enough data to resolve the issue, it is unclear whether expenditures to increase the availability of good media content or expenditures for hiring more police or building more prisons would be more effective at reducing crime. Of course, other justifications often support the same subsidy (or an overlapping set of subsidies). For example, a society might believe that, like education, access to significant cultural material is a basic part of membership in the society.

In contrast to promoting positive externalities, one response to negative externalities is almost instinctual. The policymaker or the public often wish to ban or restrict expression that it believes encourages antisocial conduct. Even if apparently justified on efficiency grounds, this response directly contradicts most interpretations of the First Amendment.<sup>136</sup> Respect for people as moral agents is consistent with *encouraging* their exposure to collectively considered "good" speech, but not with paternalistically denying them access to speech considered bad. Such respect requires attributing legal or moral responsibility to the person who engages in the offensive act. Attributing the responsibility to the media that the person consumes treats the reader or viewer as a mere puppet whose strings the media pulls.<sup>137</sup> Respect for agency recognizes that media content itself never has uniformly good or bad effects. Rather, different viewers (in differing contexts) take different things from their exposure to the same

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<sup>135</sup> See Murray, *supra* note 76.

<sup>136</sup> In marketplace of ideas theories, the response is more speech or to accept the negative consequences. See, e.g., *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes & Brandeis, JJ., dissenting) (arguing that even proletarian dictatorship should be accepted if speech persuades); see also *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985) (holding that harm caused by pornography does not justify suppression), *aff'd*, 475 U.S. 1001 (1986). Likewise, a liberty theory asserts that harm does not itself justify suppressing speech. See Baker, *supra* note 70.

<sup>137</sup> See C. Edwin Baker, *Of Course, More Than Words*, 61 U. CHI. L. REV. 1181, 1205-06 (1994) (critiquing Catherine MacKinnon in part for not taking women and men's agency seriously).

cultural artifact. Even if suppression seems to be a quick fix, it is usually ineffective in its goals, can reinforce negative and restrictive images of its supposed beneficiaries as well as of its overbroad set of targets, often generates additional problems, and can divert attention from more useful responses.<sup>138</sup> Although particular responses or effects of media content are clearly objectionable, the content itself will always be multivocal and its meaning and use contested.<sup>139</sup> Attempts at suppression on the basis of characterization of content as bad, for example, because of its portrayal of violence or sex or impropriety, will often mask ideological attempts to reify majoritarian or status quo views.<sup>140</sup> Each point provides a pragmatic reason to believe that a free speech ideology committed to protection of dissent and to a process of change should not permit suppression.<sup>141</sup>

Zoning sometimes either reduces negative or enhances positive externalities. Children are assertedly especially vulnerable to injury by media content. Out of either paternalism (for their own good) or a desire to reduce negative externalities (effect on children leads to bad consequences for others), policymakers often propose to restrict children's access to various media products. The issue merits more attention. Often, restriction will amount to a centrist attempt to mold people according to the most conventional popular standards. Arguably, such a policy contravenes basic First Amendment principles.<sup>142</sup> Parental control of children is, however, widely accepted. Practices that reduce parents' capacity to exercise control can be considered negative externalities, and practices that increase this capacity can be considered positive. Mandates for rating systems or devices like the V-chip technology *might* usefully increase this capacity. "Channeling" of indecency on television could give parents a time period, for instance daytime hours, when they could be assured that, even if unsupervised, their children would not have such easy access to the restricted programming.

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<sup>138</sup> See Carlin Meyer, *Sex, Sin, and Women's Liberation: Against Porn-Suppression*, 72 TEX. L. REV. 1097, 1100-01 (1994). For a rare, thoughtful attempt to consider serious structural responses to media portrayals of violence, see Kim, *supra* note 39.

<sup>139</sup> See Amy Adler, *What's Left? Hate Speech, Pornography, and the Problem for Artistic Expression*, 84 CAL. L. REV. (forthcoming 1996); see also Lili Levi, *The Hard Case of Broadcast Indecency*, 20 N.Y.U. REV. L. & SOC. CHANGE 49 (1992-93).

<sup>140</sup> See Kenneth L. Karst, *Boundaries and Reasons: Freedom of Expression and the Subordination of Groups*, 1990 U. ILL. L. REV. 95, 95-99.

<sup>141</sup> See BAKER, *supra* note 99, ch. 5.

<sup>142</sup> Cf. Board of Educ. v. Pico, 457 U.S. 853, 868-69 (1982) (holding the First Amendment imposes limitations on a school board's discretion to remove books from junior and senior high school libraries).



Still, any robust system of expression must accept the principle that the adult population not be reduced to the level of children.<sup>143</sup> For example, channeling must at least leave ample time periods during which the adult audience can view any programming it wants (within the notable constraint of what the broadcasters choose to offer). Channeling that satisfies this basic principle regulates speech, but arguably does not “abridge” the relevant freedom of either the media or the public.<sup>144</sup> The issues then become empirical—and political. Will the proposed practice—V-chips or channeling—really enhance parental authority? Do parents actually want that enhancement? What will the practice cost? Will this response to the evils of unrestricted commercial broadcasting divert attention from more meaningful responses, and so on?<sup>145</sup>

Various private and governmental policies encourage the media’s performance of the “checking” function, the fourth externality listed above.<sup>146</sup> Journalism is a prize-ridden profession. Both individual journalists and some owners of media entities devote resources to winning privately provided “Pulitzers” and various less prominent prizes. Likewise, although investigative journalism is always expensive, some legal rules decrease the costs borne by the media and thereby increase its production. Examples include restrictions on liability for defamation, especially for discussion of public affairs, the Freedom of Information Act’s (FOIA) subsidized provision of information, and reporters’ privileges. Even if these measures are grossly inadequate to correct for the market’s failure to create appropriate incentives, they do externalize some costs as a rough response to the fact that media entities only receive payment for a fraction of the benefits from performance of the checking function.

The specifics of these “subsidies” can be criticized, however. Their content can bias the choice of which abuses to expose.<sup>147</sup> FOIA’s grant of cheap access

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<sup>143</sup> See *Butler v. Michigan*, 352 U.S. 380, 383 (1957).

<sup>144</sup> See *FCC v. Pacific Found.*, 438 U.S. 726, 750–51 (1978); see also *Ginsberg v. New York*, 390 U.S. 629 (1968) (print media); *Sable Communications v. FCC*, 492 U.S. 115 (1989) (telephone). Likewise, the same point about not decreasing availability was emphasized where the physical zoning was justified on the basis of decreasing negative externalities unrelated to any interest in restricting access to communicative content. See *Young v. American Mini Theaters*, 427 U.S. 50, 62–63 (1976).

<sup>145</sup> See C. Edwin Baker, *The Evening Hours During Pacifica Standard Time*, 3 VILL. SP. & ENTER. L.J. 45, 55–60 (1996). *Pacifica* is consistent with a constitutionally permissible attempt to enhance parental authority. However, prohibiting indecency between 6 a.m. and 12 p.m., upheld in *Action for Children’s Television v. FCC*, 58 F.3d 654, 669 (D.C. Cir. 1995) (*en banc*), improperly accepted a majoritarian purpose of molding people.

<sup>146</sup> See *supra* Part III.A.4.

<sup>147</sup> See William P. Marshall & Susan Gilles, *The Supreme Court, the First Amendment, and Bad Journalism*, 1994 SUP. CT. REV. 169, 207–08.

to (some) government information as compared to, for example, the unavailability of corporate information on demand, and common law as well as the constitutional protection from liability when media (or nonmedia) speakers libel government as opposed to the private actors, could encourage the media to focus on exposing governmental as compared to private (corporate) wrongdoing. This bias is also evident in defamation law's neutral report and fair report privileges.<sup>148</sup> These rules arguably "subsidize"—make easier, cheaper, or less likely to create liability—damaging reports concerning government or government officials rather than those concerning corporate misbehavior. To the extent this bias is reflected in reporting, it could encourage greater distrust of government as compared to corporate power, a bias that could tilt against people's motivation as well as ability to promote the public good (*i.e.*, these rules create a negative political externality).

The fifth externality concerns the effects of actual or potential media exposure on the behavior of third parties (people other than the media's primary audience).<sup>149</sup> Particular instances will have differing, sometimes contested, valences. Sometimes people will respond to the possibility of media coverage with behavior that benefits others, sometimes with behavior that inflicts harm. Possible legal responses are various, and often their wisdom (and constitutionality) is disputable. Whether trials or governmental meetings should be closed, whether nonconsensual video or audio taping by the media should be allowed or restricted, depend in part on assessments of whether these practices will have good or bad (or minimal) effects on the participants' behavior—their frankness and honesty, their attention and thoughtfulness, their willingness to bargain. Likewise, either law or media self-restraint could limit media coverage of terrorist acts in the hope of discouraging such behavior.<sup>150</sup> Alternatively, successful efforts to make the media order more open might better reduce incentives to engage in terrorist behavior as a means to stimulate coverage of suppressed messages.<sup>151</sup>

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<sup>148</sup> A fair report privilege applies to publications concerning official proceedings or reports. *See Medico v. Time, Inc.*, 643 F.2d 134, 137 (3d Cir. 1981). The neutral report privilege applies to publication of charges made by responsible prominent speakers about a public figure. *See, e.g., Edwards v. National Audubon Soc'y*, 556 F.2d 113, 120 (2d Cir. 1977).

<sup>149</sup> *See supra* Part III.A.5.

<sup>150</sup> A major aspect of the controversy surrounding the *New York Times* and *Washington Post's* joint decision to publish the "Unabomber's" tract was whether publication would encourage similar terrorist behavior in support of similar demands in the future. *See William Glaberson, Publication of a Unabomber's Tract Draws Mixed Response*, N.Y. TIMES, Sept. 20, 1995, at A16.

<sup>151</sup> Some radical media critics assert that the argument that media coverage stimulates terrorism, and thus the media should deny coverage, basically blames the victim. In contrast,

The benefit of receiving media content without paying, the sixth externality,<sup>152</sup> could justify subsidies for creators and distributors. However, the political will to respond with an efficient level of subsidies is likely always to be lacking, and the subsidy approach creates serious problems for wisely and efficiently selecting beneficiaries. Alternatively, the legal regime sometimes creates nonmarket means to collect payments for the benefit (for example, by imposing a surcharge on equipment and blank tapes<sup>153</sup> or on musical performances and distributing the proceeds to copyright owners). A common practice in Europe is to impose an annual fee on radios and televisions or a tax on their sale to raise money to support public broadcasting, which is then distributed without charge. These nonmarket structural interventions, as well as copyright protection—which is possibly the single most important legal device aimed at helping content creators collect for access to their creation—will be grossly inadequate to fully internalize the benefits gained by nonpaying audience members and, on the other hand, will restrict the availability of a public good, creating a serious inefficiency.

The seventh externality cataloged above, benefits to individuals or groups from favorable media attention,<sup>154</sup> generates complexly ambivalent legal responses. First, being a positive externality implies both inadequate media expenditures on producing such content and media prices for that content that are too high, thereby preventing the public from getting content that they want. These features implicitly justify subsidies, mostly of the sort already recommended above. In contrast, direct internalization of these benefits—payment for favorable coverage—is often viewed as corruption and is legally discouraged. For instance, laws require media entities to identify as advertising any content that someone or some entity has paid them to present.<sup>155</sup>

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they suggest that terrorist activities themselves are a (sometimes rational) response to an inadequate media order that screens out views of dissident groups or facts of which the public should be aware. Rather than suppress coverage of terrorists, a more legitimate response would be to open up access to the means of effective expression. See, e.g., ALEX P. SCHIMD & JANNY DE GRAAF, *VIOLENCE AS COMMUNICATION* 33–42 (1982).

<sup>152</sup> See *supra* Part III.A.6.

<sup>153</sup> Some countries, for example, Germany, use this procedure although it has not been adopted in this country. See Gary S. Lutzker, *Dat's All Folks: Cahn v. Sony and the Audio Home Recording Act of 1991—Merry Melodies or Looney Tunes?*, 11 CARDOZO ARTS & ENT. L.J. 145, 183 (1992); cf. *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 456 (1984).

<sup>154</sup> See *supra* Part III.A.7.

<sup>155</sup> See 47 U.S.C. § 317(a)(i) (1994) (imposing on broadcasters a duty to identify payee as advertiser); *Lewis Publ'g Co. v. Morgan*, 229 U.S. 288, 313–14 (1913) (upholding against First Amendment challenge a statute that imposed this requirement on newspapers receiving second class mail privileges).

However, inadequate production is probably not the most serious issue here. More important may be a distributive issue—some individuals and groups get this benefit, some do not. Worse, markets do not distribute this inequality randomly. Media critics continually observe that organizations with large public relations or advertising budgets—usually corporate or other elite interests—and individuals holding high political position have much greater access to the media than others.<sup>156</sup> This greater access does not necessarily nor consistently reflect greater public interest in their views, greater reliability of their pronouncements, or greater intrinsic importance of their insights or information. It does not even necessarily reflect reporters' or editors' own greater interest or confidence in these sources—although media professionals' ideological bias concerning the relation of class, gender, race, and role position to knowledge or insight is observable. Rather, their access reflects in significant part their ability to make themselves easier and cheaper to rely upon.<sup>157</sup> Organizations that routinely put out information—most obviously government but also to some extent large corporate entities—not only pay a large portion of the expense of gathering and composing information but also are often conveniently and cheaply integrated into reporters' beats.

Various policy measures can be understood to respond to this tendency to distributionally skew the underproduction of favorable media attention. Most obvious are governments' usually marginal attempts to empower those otherwise least able to indirectly "pay" for the presentation of their perspective. Examples include tax exemptions or postal subsidies for nonprofits, especially for their public relations activities, media access schemes ranging from public access cable channels to right of reply laws or the FCC's Fairness Doctrine, and policies designed to encourage "alternative" media.<sup>158</sup> These efforts are, however, frequently attacked. The FCC has now abandoned, based both on a deregulatory ideology and a constitutional analysis, the Fairness Doctrine;<sup>159</sup> access cable channels are under constitutional attack;<sup>160</sup> postal subsidies are

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<sup>156</sup> See HERMAN & CHOMSKY, *supra* note 34, at 51.

<sup>157</sup> Sometimes the law directly supports this bias. Privileges in the libel area permit easier reliance on or reportage of statements by a public official or charges made by "a responsible, prominent organization . . . regardless of the reporter's private views regarding their validity." *Edwards v. National Audubon Soc'y, Inc.*, 556 F.2d 113, 120 (2d Cir. 1977).

<sup>158</sup> The Court suggested that the content-based, discriminatory tax scheme invalidated in *Arkansas Writers' Project v. Ragland*, 481 U.S. 221, 232-33 (1987), might have been constitutional if it could plausibly have been understood as designed to help "fledgling" publications.

<sup>159</sup> See *Syracuse Peace Council v. FCC*, 867 F.2d 654, 669 (D.C. Cir. 1989).

<sup>160</sup> See *Time Warner v. FCC*, 93 F.3d 957 (1996).

declining;<sup>161</sup> tax exemptions are limited and sometimes operate to restrict important speech;<sup>162</sup> alternative media are often suppressed.<sup>163</sup>

The appropriate goal is more complex than equalizing access. Equalization of media attention or favorable comment is, of course, impossible. It is also misguided. Both media and audience attention are appropriately selective. Although at one point 47 U.S.C. § 315's provision of equal opportunities for political candidates was thought to require that all candidates, no matter how minor the party, be invited to participate in any televised debate,<sup>164</sup> it is questionable whether equal opportunities serve the public well.<sup>165</sup> More generally, favorable content should depend on the merits. Distributive issues, however, reappear in that groups and individuals inevitably contest the importance of differing foci.

Still, fairness (or wisdom) lies less in quantitative equality than in thoughtful, intelligent, non-monetary-based choices of where and how to focus media attention. A partial response would be independent, professional journalists (or media-content-creators) with budgets adequate to avoid rank manipulation by business and government and with sufficient pluralism of

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<sup>161</sup> See Richard B. Kielbowicz & Linda Lawson, *Reduced-Rate Postage for Nonprofit Organizations: A Policy History, Critique, and Proposal*, 11 HARV. J.L. & PUB. POL'Y 347, 348-49 (1988).

<sup>162</sup> See *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 549-50 (1983).

<sup>163</sup> See *In re Review of Stephen Paul Dunifer*, 11 F.C.C.R. 718 (1995) (upholding ban on low power radio station); *Rebels Hoist Challenge to Radio Rules*, CHI. TRIB., Aug. 5, 1996, at B1; Luis J. Rodriguez, *Rappin' in the 'Hood*; *Rebel Radio*, THE NATION, Aug. 12, 1991, at 192; Michael Wines, *An Internet Service Is Denied Access to the Capitol*, N.Y. TIMES, Feb. 26, 1996, at D7 (relating story about Vigdor Schreiber, a leftist nonprofit internet news service publisher who was denied access to Congressional press galleries because his venture was not commercial); SILENCING THE OPPOSITION: GOVERNMENT STRATEGIES OF SUPPRESSION OF FREEDOM OF EXPRESSION (Craig R. Smith ed., 1996).

<sup>164</sup> In 1975, the FCC changed its interpretation of "use" of a broadcast station, where a use required that all other candidates get equal access, and this change permitted the League of Women Voters to sponsor debates. See *Chisholm v. FCC*, 538 F.2d 349, 366 (D.C. Cir. 1976). The earlier Kennedy-Nixon debates had only been allowed because of special Congressional legislation. *Id.* at 360.

<sup>165</sup> In 1996, the major networks sought exemption from the equal opportunities requirement so that it could provide free time for "major presidential candidates, as determined by the Commission on Presidential Debates." Public Notice, FCC Seeks Comment on Issues Relating to Broadcaster Proposals to Provide Time to Presidential Candidates; Will Hold En Banc Hearing (May 13, 1996) (for information, contact the Federal Communications Commission, 1919 M St., N.W., Washington, D.C. 20554 or <[http://www.fcc.gov/Bureaus/Mass\\_Media/Public\\_Notices/pnmm6004.txt](http://www.fcc.gov/Bureaus/Mass_Media/Public_Notices/pnmm6004.txt)>) (emphasis added).

backgrounds among the journalists (and those with power to make content decisions) that individual journalist's or owner's inevitable adoption of particular perspectives will not silence alternative approaches to society.<sup>166</sup> Rather than equality, the response to the distributive concern is probably best seen as providing for media independence combined with adequate pluralism.

Some people will experience media attention as harmful, the eighth externality noted.<sup>167</sup> If media offer this "harmful" attention, audiences must be assumed to value it to some, roughly market-indicated, extent; or, in relation to false information, audiences presumably would prefer accurate coverage but are unwilling to pay for (or are unable to identify) greater investigative care. Even if the audience gets the level of accuracy it pays for, the audience's calculations, and therefore, according to economic logic, the media's decisions will not include as a cost the injury to people harmed by the content. At least, the media will not if, as I assume for the moment, the people harmed have no effective opportunity to pay to suppress publication.

Tort law "remedies" provide the most obvious policy response. Libel law partially internalizes some harms caused by inaccurate information about people and products, but is usually inapplicable if the harm results from accurate information<sup>168</sup> or from negative opinion.<sup>169</sup> Tort law seldom covers even harmfully inaccurate information if the information is not about the harmed person or product<sup>170</sup> (for example, a misguided weather report that causes people not to go and spend money at the resort, inaccurate information about the economy that helps defeat an incumbent, or inaccurate praise of one's opponent or competitor). Although the tort of invasion of privacy may properly have little if any actual bite,<sup>171</sup> like defamation law it potentially could impose liability on media enterprises for harm to the person described. Here is not the place to explore either the economic coherence or constitutional acceptability of

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<sup>166</sup> Cf. *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 566 (1990) (upholding FCC minority preference policies against an equal protection challenge because they are related to the achievement of broadcast diversity).

<sup>167</sup> See *supra* Part III.A.8.

<sup>168</sup> Although the Supreme Court consistently protects the media from liability for publication of truthful information, it refuses to accept the media's suggestion that it "hold broadly that truthful publication may never be punished consistent with the First Amendment." *Florida Star v. B.J.F.*, 491 U.S. 524, 532 (1989).

<sup>169</sup> Cf. *Milkovich v. Lorain Journal*, 497 U.S. 1, 17-20 (1990) (holding that liability depends on plaintiff being able to prove that statements concerning public matter are false).

<sup>170</sup> But cf. *Saloomey v. Jeppesen & Co.*, 707 F.2d 671, 676-77 (2d Cir. 1983) (allowing recovery for plane crash due to inaccurate flight chart, analogizing chart to product and using products liability doctrine).

<sup>171</sup> See Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 362 (1983).

these doctrines. The point is merely that they represent legal attempts to reduce negative externalities by forcing the media entity to internalize the cost.

Truthful exposés (and sometimes even false information) that harm some third parties are often considered valuable by other third parties. Candidate *Y* or the seller of product *Y* wants it known, truthfully or not, that candidate *X* is corrupt or product *X* is defective.<sup>172</sup> If true, negative and positive externalities may roughly balance out. However, with certain categories of content—true but salacious gossip or other purported invasions of privacy<sup>173</sup>—identifying the positive third party externalities to balance against the negative externalities is difficult and controversial.<sup>174</sup> A purported lack of positive externalities in these

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<sup>172</sup> Since both the positive and negative third party benefits can easily exist whether or not the information is true, the different treatment of true and false information may reflect distributional or fairness concerns rather than mere efficiency matters. But this turns out to be more complex. For instance, there may be inefficiencies in a system that promotes the creation and spread of false information. This instance provides an efficiency reason to make the distinction.

<sup>173</sup> Even where recognized, the tort requires that the information not only be “highly offensive” but also be of “no legitimate public concern.” See *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1232 (7th Cir. 1993); see also RESTATEMENT (SECOND) OF TORTS § 652D (1981).

<sup>174</sup> To say “difficult or controversial” does not rule out positive externalities of “salacious” gossip. See *Anderson v. Fisher Broad. Co.*, 712 P.2d 803, 809 (Or. 1986) (noting that some editors may believe that “community should see or hear facts or ideas that the majority finds uninteresting or offensive” in protecting presentation of video of accident victim while bleeding and in obvious pain). Creation of categories of truthful but punishable speech is dangerous. It tends to reinforce conventional views and power relations, thereby being directly inconsistent with First Amendment premises.

People’s capacity to gossip may help equalize the distribution of social power. (More problematic is the tendency for law to specially protect “gossip” when engaged in and valued by the powerful—like in hiring contexts.) Karst’s argument that the First Amendment most crucially protects “unreason” is suggestive of the notion that gossip is both a means of resisting dominant power and the capacity for popular participation in creation and maintenance of norms. See Karst, *supra* note 140. See generally Max Gluckman, *Gossip and Scandal*, 4 CURRENT ANTHROPOLOGY 307 (1963). “Outing” may change general attitudes as well as affect behavior. See LARRY P. GROSS, *CONTESTED CLOSETS: THE POLITICS AND ETHICS OF OUTING* (1993).

Still, the harms caused by truthful information can be serious and sometimes unfair. Rather than the largely ineffectual attempts at suppression through imposition of liability, arguably, the policy response should be to search for ways to decrease the likelihood that speakers (and the press) will impose these harms unwisely (for example, merely for commercial gain). Unjustified imposition of harms might decline if journalistic (or societal) norms improved or if media professionals gained greater power to resist market pressures. Changed interests of a better educated or more mature public could reduce market incentives

cases may help explain legal distinctions between truthful communications characterized as invasions of privacy, especially of private figures, from truthful exposés of publicly relevant information—which are almost always exempt from liability.

Superficially, a rough balance between positive and negative externalities might also exist for discrediting false information. The person misdescribed is harmed while some other candidate or competitor benefits.<sup>175</sup> Nevertheless, the seeming balance may be misleading. The costs to the person misdescribed, including the resources spent on trying to correct the record, may routinely outweigh benefits to her competitors. And the inaccurate information harms members of the public who are misled in their choices. Moreover, the benefit that the competitor receives is analogous to the benefit from a theft. In each case, practices aiming at knowingly creating the benefit not only distribute benefits unfairly and inefficiently but also induce potentially escalating, wasteful, self-protective activities.

Costs created by the practice of news gathering, the tenth externality,<sup>176</sup> are usually internalized by the same legal rules that apply to similar costs created by similar activities by people other than journalists. Application of trespass law is illustrative.<sup>177</sup> Often, however, the regulatory goal is to stop only forms of news gathering that impose costs that are predictably greater than the gains the news gathering would achieve. For example, state law might give reporters permission to trespass on some sort of “implied consent” theory, especially when the reporter trespasses openly and without violating any explicit demands to keep out, in places where newsworthy events are occurring or have recently

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to publish or broadcast personally harmful content. Or the policy response could be to reduce harm the exposés will cause (for example, by teaching people to have more tolerance). Surely no negative consequences should result from knowledge that a person is gay or has been raped. Policies directed at stimulating these changes are arguably more liberating than attempts at suppression—and the two types of responses sometimes work at cross purposes. Prohibiting identification of rape victims or exposure of a gay or lesbian’s sexual orientation, for example, reinforces the view that these facts are somehow discrediting.

<sup>175</sup> Distributive or fairness considerations, however, may require that these benefits *not* count at all for policy purposes. I should emphasize that my description of possible economic logic of some of these legal policies does not mean that this is either their actual or the appropriate rationale.

<sup>176</sup> See *supra* Part III.A.10.

<sup>177</sup> Externalities imposed by the news gathering itself and the externalities created by media content can be treated differently. For instance, both the trespass and the subsequent story written by a trespassing journalist can impose costs on third parties. The law, however, might impose liability only for the first. See, e.g., *Costlow v. Cusimano*, 311 N.Y.S.2d 92, 97 (1970).



occurred.<sup>178</sup> This rule sometimes leaves individual property owners to bear the "cost," and since this cost is not brought to bear on the media, the rule "subsidizes" production of particular types of media content.

Many jurisdictions restrict nonconsensual use of tape recorders. The interest protected is sometimes difficult to describe since the law imposes no restriction on nonconsensual publication or broadcast of the content that the reporter hears but does not record. Presumably, the ban protects some aspect of privacy or deniability, thereby reducing some costs otherwise created by the news gathering process. The ban, however, also reduces the accuracy of content made available to the public.<sup>179</sup> Likewise, the government sometimes regulates the manner of coverage of legislative, administrative, and judicial proceedings in order to prevent the news gathering techniques from having negative effects on the proceedings (or, more troublingly, regulates with an eye to how coverage advantages or disadvantages the people with the power to choose the rules).

### C. Policy Summary

The catalog of externalities displays huge and vitally important media effects that are not internalized in the decisions of paying audiences or media enterprises. Some policy responses have been described. But, more generally, what are the implications of these observations? What follows?

First, given the immense scale of potential positive externalities, the expectation must be that the market itself would produce and deliver drastically inadequate amounts of "quality" media content (with "quality" meaning here content that has significant positive externalities). Audiences would want much more quality content if they were charged its "real" cost. They could be

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<sup>178</sup> See Note, *And Forgive Them Their Trespasses: Applying the Defense of Necessity to the Criminal Conduct of the Newsgatherer*, 103 HARV. L. REV. 890, 893-903 (1990). Compare *Florida Publ'g Co. v. Fletcher*, 340 So. 2d 914, 918 (Fla. 1976), with *Stahl v. State*, 665 P.2d 839, 841 (Okla. Crim. App. 1983). Allowing the trespass may reflect the prediction that, if not for insurmountable transaction costs, permissions would be obtained, sometimes with and sometimes without a charge—such that the rule reaches a Kaldor-Hicks result. However, sometimes a permissive approach to trespassing may reflect a view of the value of news gathering that should outweigh the interest in a private property owner in suppressing information even when the owner would deny permission or charge an amount larger than the media would be willing to pay.

<sup>179</sup> A law making it criminal to record without the consent of all parties was upheld against the claim that the recording aided the accuracy of reporting and provided corroboration in a suit for defamation. See *Shevin v. Sunbeam Television Corp.*, 351 So. 2d 723, 727 (Fla. 1977).

charged much less if the media seller did not have to recover all of its costs from its audience but instead received some payment from third parties (or from the state acting in behalf of third party beneficiaries). Of course, these observations do not demonstrate the merit of trying to supply the audience "what it wants" as economically defined; that is an independent normative issue. What these observations do demonstrate is that the goal of giving the public what it wants (in market terms) requires governmental policies directed toward greatly increasing the resources devoted to creating and supplying quality media content.

Second, audiences also now get too much "junk" (with "junk" meaning here content that has significant negative externalities). The audience would get much less of this content if they were required to pay its "real" cost (*i.e.*, its cost after the media had internalized the content's negative externalities).

Third, although the general nature of externalities can be described—but even as to this, surely the broad categories listed above are incomplete—the most careful investigation will provide no precision about their extent. Social science's inability to precisely identify the extent of media "effects" makes this inevitable. Likewise, disputes will exist even about the characterization of various externalities as positive or negative. Any attempt to attribute media content to particular legal regimes will also be wildly inexact. Even thinking of these issues in terms of "externalities" may itself qualitatively mislead discussion. As I will discuss in Part IV, this commodified formulation of issues of value and choice may be inconsistent with the way people ought to conceive and treat themselves and their cultural environment. These observations counsel great caution about policy analysis. However, the view that these imprecisions discredit intervention hardly follows.

Useful policy analysis may require some efforts to make judgments about the extent and value of externalities and the difference that various legal orders make. The market's overt and apparently massive inadequacy at providing the audience what it wants suggests the importance of policy responses. Despite the inadequacies of the political process and its manipulability by corporate, incumbent political, or other special interests, most past political interventions have (arguably) been improvements over the result of an unregulated market, even if the improvements have been systematically less than what should be politically feasible if backed by progressive political forces and thoughtful analysis.<sup>180</sup> Inadequacies in the political order should not provoke abandonment

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<sup>180</sup> Elsewhere, I have suggested that the symbolic power of the First Amendment may have discouraged sustained attention to media policy in this country, *see* BAKER, ADVERTISING, *supra* note 11, except by the industry entities which often seem willing to ignore their potential First Amendment rights when it is in their interest, but which quickly invoke them whenever regulation shows the potential to interfere with profitability or power.

of efforts but, instead, consideration of how to improve the only arena that offers hope of a better media environment. Surely any democratic faith requires this.

#### IV. MARKET EXPRESSIONS OF WANTS: A MISGUIDED STANDARD

In a perfectly working marketplace, people engage in exchanges so as to best fulfill their existing preferences as expressed in the market, given their willingness and ability to pay. Assuming a perfectly working marketplace, this formulation still leaves three obvious points for a critique of reliance on the marketplace to determine the content and the distribution of media content. Objection could be raised to (a) reliance on exchange relations as the basis for allocation, (b) reliance on people's ability to pay, or (c) reliance on people's existing preferences as expressed in the market.<sup>181</sup>

##### A. Commodification

Market exchange commodifies the good exchanged.<sup>182</sup> For purposes of the exchange, each party treats the item she gives up solely instrumentally. She uses the item as a means to exercise power over the other. That is, she uses it and values it solely as a means to get a performance from the other that the other gives only because of the receipt of "payment."<sup>183</sup> The social role or value of some goods may be perverted or undermined merely by being

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See MCCHESENEY, *supra* note 126, at 252-70 (stating that broadcasters ignored the First Amendment while advocating government intervention during the period when they used government to help consolidate their control and rid themselves of competition from nonprofit and educational users, but once they had control, invoked it in an attempt to rid themselves of public interest oriented, governmental intervention).

<sup>181</sup> The objections here differ from the earlier critique of "law and economics" methodology as a means to choose or justify legal rules. See *supra* note 67. There I noted the conceptual *impossibility* of relying on an existing distribution of wealth or set of constant preferences for choosing rules because these are at least part of the issue in dispute. That impossibility existed because the baseline on which the economic analysis depends was what was at issue (a point that many law and economics practitioners continue to ignore). Some economists, however, might grant the theoretical correctness of that critique but question its practical significance. In contrast to that critique, here a context in which the baseline exists can be assumed. Thus, here the objection is not to the impossibility of such reliance but to its appropriateness.

<sup>182</sup> See generally RADIN, *supra* note 67, at 1-15.

<sup>183</sup> See C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741, 751-53 (1986).

distributed through commercial exchange, as something owned or even ownable, rather than being subject only to being earned or bestowed.<sup>184</sup> Although people often spend large sums of money on preparation for a competition—a sports or intellectual competition—the very point (and value) of winning the first place award is that, in the final instance, it is “earned,” not purchased. The trophy customarily has a unique and usually higher value to the person who won it and, maybe, to her family than to a stranger. Certainly its value is as a historically or narratively identified object rather than as an “anonymous” object available for use—market exchange inevitably changes and often defaces or erases that history or narrative.<sup>185</sup> Similar things are often said of love. Some people’s primary objection to commercialized sex is a fear that commercialization will pervert or undermine the social salience of a noncommodified conception of love. For somewhat different reasons, society resists the commodification of the vote, elected office, or life preserving body parts.

Many people also resist commodification of some aspects of communications. Calling teaching an act of love expresses the more general thought that in at least some social interactions (in conversation, for example) people ought to give others the benefit of their insight.<sup>186</sup> Doing so shows respect or care for the recipient. Commercializing conversation is sometimes, not always, resisted. Restating this at a societal level, the claim would be that

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<sup>184</sup> Slightly different is the belief that certain activities of creating and certain created goods are perverted if produced merely on the basis of market demand, whether or not those goods are then thought appropriately distributed by the market. This observation relates to one rationale for treating many occupations that sell “speech,” such as psychiatry, law, teaching, or the priesthood—and journalism—as professions. It also spawns professionals to complain about their audience “killing the messenger.”

<sup>185</sup> See Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 686–87 (1979).

<sup>186</sup> A perverse case of commodification are the students who do not talk in class out of fear of giving away their “good ideas.” This can be contrasted with the activist who seeks to give away “good,” public interest oriented ideas. Academics are used to people being charged tuition for the receipt of speech. Nevertheless, there was a strange unease in the late 1960s about students who complained that they were not getting what they paid for when professors canceled a class as part of a political protest. Likewise, many, not all, think for a student to bring a nonpaying friend to class to be unobjectionable unless the friend’s presence is disruptive or there is inadequate physical space. Many instructors would not even object to a nonpaying person sitting in all semester. When I realized this as an undergraduate, I became quite despondent at the thought that I (that is, my parents) were paying for credits or degrees, not for an education, which was apparently available for free. The economic perversity of my reaction reminds me now of the standard movie story line of the guy paying the hooker and only wanting conversation, with this eventually leading to sex (love?) without payment. See *LEAVING LAS VEGAS* (METRO-GOLDWYN-MAYER/UNITED ARTISTS 1995).

various cultural resources ought to be available to people not based on their willingness and ability to pay its market price, maybe not even through market transactions, but through social interactions defined by solidarity, honesty, and willingness to search for answers. Although trade secrets, patents, and other legal devices help commodify *commercial* uses of facts and ideas, a sense of the unseemliness of copyrighting facts and ideas illustrates cultural resistance to commodification—a characteristic also present in the invocation of “fair use” to resist liability for many noncommercial uses of copyrighted materials. The widespread existence of and support for free public libraries and public theater can also be seen as fighting the commodification of a common culture.

A common belief is that the best cultural content will be an expression of talent, at its best, and genius, and that production following these dictates often will be inconsistent with production of commodities for the market. Similarly, the claim is that journalism should express integrity and craft unperverted by the market. I will not defend these views or discuss their implications for media policy. However, if accepted, these assertions change the focus from a concern for fulfilling audiences’ market-expressed preferences for media commodities to a concern with the opportunities for and conditions of intelligent and valuable content creation and cultural development. These assertions suggest that maybe a good society would provide space or opportunities, presumably meaning a subsidy, for the creative expression of either all people or, at least, of specially identified professionally committed people or specially identified “talented” people.

Despite these observations, for the most part, I am inclined to see objections to commodification of the media as either limited or derivative. For example, concerns over opportunities for artistic creation raise distributional issues. Should all or at least specially talented people receive, as a matter of right, certain opportunities for creative expression rather than have those opportunities limited to those who can sell their product or who are independently wealthy? In this account, the objection is not so much to sales, but to the limit of creative opportunities to those who can sell. Or the complaint is about the audience’s market expressed desires controlling what content is created, not the fact that the content is sold. Similarly, many of the points about libraries and copyright can be restated in terms of the distribution and preference measurement issues. Certainly, the way authorship and media consumption works in many people’s life is contrary to market logic and can be cheapened by participation in or focus on market processes. However, as with many goods, noncommodified ways of relating to cultural content should be able to coexist with unrestricted markets—people remaining free to opt out of the commodity frame to the extent they choose.

This coexistence, however, is not necessarily available. Professor Margaret Jane Radin asks whether a “domino” effect applies—whether some commodification will lead to the activity or good being progressively seen more and more as a commodity, with the result that the noncommodified relation eventually becoming unsustainable.<sup>187</sup> This question is vital. I suspect that usually, and certainly in the realm of media content, the domino effect will not apply. Opportunities for noncommodified relations to creation, distribution, and consumption of content can coexist with commodification. Rather than prohibit commodification, people should be left to create a more or less commodified world that reflects an aggregate of many individual choices. In fact, rather than being undermined primarily by the social availability of commodity form, I suspect that noncommodity relations are improperly undermined more by distributional injustices, some of which unfairly coerce participation in the market. For example, the problem is not that writers can sell their stories but that poverty forces the creative writer to sell by the word or to add sex scenes. On the other hand, political and legal structural choices will certainly push toward or away from treating particular goods or relations in a commodified form. For reasons implicit in Part IV.C, I would argue that society should choose to generate greater space for noncommodified practices around media-type content.

## B. *Distribution*

The existing distribution of wealth in the United States seems to me unquestionably unjust. Given this injustice, then those outcomes that result from reliance on the existing distribution of wealth as the starting point (as do market practices) are also presumptively unjust—or, in the language I have been using, are not what people would want under an acceptable distribution of wealth. These views’ distributional objections arguably discredit the results of reliance on markets for determining the production and distribution of media products—but no more than they do for any other product. In this section, I will consider distributional concerns that may have special relevance in the media context.

### 1. *Principles of Distribution*

No society believes that all goods are properly distributed on the basis of willingness and ability to pay. Apparently democratic societies always treat

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<sup>187</sup> See RADIN, *supra* note 67, at 95–101; *cf.* Baker, *supra* note 69, at 405–09 (stating that practices that “determine” the availability of opportunities rather than merely having an “additive” influence on their availability should be subject to regulation).

some goods as properly distributed on a basis of equality or need (or merit of some sort).<sup>188</sup> The vote, citizenship, life sustaining organs, and various negative liberties are possible examples. Many democracies guarantee at least minimal levels of public education, food, shelter, and health care to all members. Receipt of police and fire protection is usually distributed free on a somewhat egalitarian basis.<sup>189</sup>

Law also restricts market alienability of some goods. Society might conclude, for example, that alienability would undermine the role of a good as a component of a valued process (*e.g.*, the vote, elected political office); or that commodifying the good is contrary to how that society values that good (*e.g.*, citizenship access to public services); or that market alienability would generate temptations that conflict with society's paternalistic judgments concerning the way or degree people should value the good (*e.g.*, food stamps, sex, or free public education). Inalienability of some goods (for example, basic human rights), especially if constitutionalized, is somewhat more complex. The doctrine that the government cannot impose unconstitutional conditions on the receipt of benefits protects these rights from certain induced alienations. Still, people can alienate these rights in other circumstances. For example, it is permitted if alienation directly advances the purpose of some acceptable practice—a job or a plea bargain—in which the person wants to participate. Markets in publicly provided goods are often discouraged or prohibited even if markets in closely related products—private parks, security services, or education—are common.

Distributional principles vary depending on context and type of good considered. What principles should apply to media products? The different functions served by various media products complicate the answer. The media educates; it informs political participation; it foments and energizes political and civic activity; it provides a forum for public debate and dialogue; its content

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<sup>188</sup> According to Michael Walzer, "[t]he social contract is an agreement to reach decisions together about what goods are necessary to our common life, and then to provide those goods for one another." MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 65 (1983). He goes on to claim that "[t]here has never been a political community that did not provide, or try to provide, or claim to provide, for the needs of its members as its members understood those needs." *Id.* at 68. This account emphasizes that the goods considered essential to membership and that are distributed on a nonmarket basis vary with the culture of the particular democracy. See generally C. Edwin Baker, *Outcome Equality or Equality of Respect: The Substantive Content of Equal Protection*, 131 U. PA. L. REV. 933 (1983).

<sup>189</sup> In *Shapiro v. Thompson*, 394 U.S. 618 (1969), in response to an argument that "would permit the State to apportion all benefits and services according to past tax contributions of its Citizens," the Supreme Court asserted that "the Equal Protection Clause prohibits such an apportionment of state services." *Id.* at 632–33 (footnote omitted).

influences public officials directly, but also indirectly through influencing the views or opinions of citizens; and it helps create the culture in which people live. But the media also serves a whole second set of functions. It amuses, entertains, and diverts. It promotes private consumption of commercial products and provides information relevant for people's private consumptive activities—and the list could continue. Appropriate distribution principles may partly depend on which of these functions is in play.

When the media serves the first set of functions listed above, various normative considerations favor egalitarian distributions of media content or, possibly more plausibly, distributions that make some minimum levels universally available. Since media content provides for continuing education and makes indispensable contributions to informed or reasoned political participation; many of the arguments for free and equal basic educational opportunities and for equal political participation rights apply to the distribution and availability of this media content. Long-standing policies favoring free public libraries move in this direction. These arguments of right assert that universal distribution of some level and type of media content ought to be foundational. This distribution is a base on which market considerations, with their references to the willingness to pay and the consideration of externalities, must build. Thus, this argument for universal availability of at least a minimum level of politically or culturally valuable media content is independent of, but often overlaps with, the efficiency argument<sup>190</sup> that emphasized the welfare gains resulting from zero cost pricing of public goods such as media content.<sup>191</sup> On the other hand, to the extent that the media content serves to entertain and amuse, these foundational arguments give no obvious reason why distribution should differ from that of most consumer goods sold in the market.

In *Turner Broadcasting System, Inc. v. FCC*,<sup>192</sup> the Supreme Court apparently rejected a concern with content as an appropriate basis for structural regulation of the media.<sup>193</sup> Nevertheless, content concerns have been central to governmental media regulation since at least the late eighteenth century. For example, the government gave out mail subsidies to print media as well as, more recently, licenses to broadcasters in a manner designed to produce types of dialogue or content that the government considered valuable.<sup>194</sup> Both newspapers and broadcasters exist under media-specific rules regulating

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<sup>190</sup> See *supra* Parts I, II.

<sup>191</sup> Cf. C. Edwin Baker, *Utility and Rights: Two Justifications for State Action Increasing Equality*, 84 YALE L.J. 39 (1974).

<sup>192</sup> 512 U.S. 622 (1994).

<sup>193</sup> See *id.* at 637–41.

<sup>194</sup> See Baker, *Turner Broadcasting*, *supra* note 11, at 93–114.



ownership designed to benefit the communications environment.<sup>195</sup> The Court's episodic impulse to treat content-oriented regulation by the government as contrary to basic First Amendment principle largely reflects the ubiquitous use of content-based regulations to suppress or censor speech. Suppression contradicts both egalitarian and liberty-based democratic premises. Since the government seldom wants to suppress all speech but rather wants to suppress speech of a particular content, forbidding content discrimination would largely eliminate suppression and censorship. The question, however, is whether content discrimination, when not involving suppression, can be desirable.

The equality and liberty premises that are foundational to democracy arguably call for different distributional principles for media content that serve different functions. Political equality and individual self-determination arguably require or, more plausibly, are greatly supported by egalitarian access to a broad range of the day's knowledge and culture. The difference between media materials that serve these functions and those that primarily provide entertainment or have mostly commercial uses is significantly a matter of content. Democratic principles recommend that egalitarian, as opposed to market considerations, dominate in the distribution of media content that is especially relevant to political participation and, maybe, culture-building. However, they are consistent with market distribution for content primarily serving the amusement function. Thus, these democratic principles suggest the propriety of some content discriminations in policy-based interventions.

Of course, categorization of content is not simple. The same material can serve multiple functions; since the function served is largely a matter of audience reception, an item that primarily serves one function for one person can serve a very different function for someone else or for even the first person at a different time. Moreover, the distinction between politics and entertainment, between politically salient and politically irrelevant communications, is notoriously slippery.<sup>196</sup> Still, for many legitimate and practical purposes, this and related content distinctions are continually made by individuals and governments. Content discrimination seemed implicit in the law granting cheap postal rates for publications that are "published for the

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<sup>195</sup> *See id.*

<sup>196</sup> Sometimes it is argued that the First Amendment only protects political speech from suppression. Not only should this claim be rejected on straight normative premises, but also the distinction between the categories is too problematic and too political to allow censorship or suppression of "merely" entertaining speech. *See* Zechariah Chafee, Jr., *Book Review*, 62 HARV. L. REV. 891, 895-901 (1949). Criticisms such as Chafee's apparently led Alexander Meiklejohn to modify his early views that limited the First Amendment to political speech. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255.

dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry.”<sup>197</sup> The Supreme Court, however, concluded that the Post Office was severely limited in its authority to deny that material fit the category. The necessity for choice does not permit this escape, however, in selecting books to assign in class or to purchase for the public library. Content concerns are equally central in selecting artistic or cultural projects that will receive governmental support. Thus, the legal order occasionally is forced to confront the tension between these maxims.

Even if egalitarian availability of certain media content could be theoretically defended, practical considerations would lead to modifications in its policy implementation. Media’s inevitable multi-functionality means that categorization of material for egalitarian distribution will always be inexact and somewhat arbitrary. Free distribution (and completely subsidized production) of all media content is obviously impractical. The choice, however, as to what materials receive egalitarian distribution is hazardous. Choice will likely favor established power—political and economic incumbents—and dominant ideologies. Equally important, audiences will not want or value lots of potential offerings. A more plausible goal would be to expand the availability of material of cultural or political value to the recipient. Thus, equally distributed audience-subsidies, something like a tax credit or “media stamps” for purchases of edifying material, might make theoretical sense. However, producer-subsidies for both creation and distribution will often be more practical.

Nevertheless, markets provide for material that serve other functions (for example, the purely entertainment function). They guarantee that materials unwisely or inappropriately excluded from subsidization will not be suppressed, even if they are not specially supported. Markets also provide relevant information for decisions concerning subsidies. Finally, they allow individuals to purchase “quality” content beyond any minimal provision provided by government. Thus, no acceptable policy justifies suppressing media markets. Rather, the goal can only be to enrich, supplement, or sometimes restructure these markets.

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<sup>197</sup> *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 148 (1946) (quoting 39 U.S.C. § 226 (1946)). The statute also denied second class mailing rates to “publications designed primarily for advertising purposes.” The Court’s original “utterly without redeeming social importance” obscenity test was apparently intended to identify material that had no relevance for the marketplace of ideas, but was produced and consumed *solely* to serve an entertainment function. See *Roth v. United States*, 354 U.S. 476, 484 (1957). Compare *Miller v. California*, 413 U.S. 15, 24 (1973) (adopting the “lacks serious literary, artistic, political, or scientific value” test) with *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 97 (1973) (Brennan, J., dissenting) (abandoning the “utterly without redeeming social importance” test is “nothing less than a rejection of the fundamental First Amendment premises and rationale of the *Roth* opinion”).

## 2. *Meaning of Equality*

If egalitarian considerations are to orient distribution policy in respect to some media content, what “equality” means in this context needs clarification. One common-sense egalitarian principle would be that each person gets to spend the same amount to fulfill her desires. Equality in respect to some types of goods sometimes means getting roughly the same dollars’ worth of the good. Thus, equality in school finance might be understood as each school district having the same amount of money to spend per student.<sup>198</sup> But even in public education, equal per student expenditures is only one possible meaning of equality. Maybe equality is achieved if each school district has the capacity to raise the same per student revenue by adopting the same tax rates—“district power equalization.” Or maybe equality requires that each student (or each group of students), no matter how much it costs, gets equally educated (as measured by their potential, by some absolute standard, or some other measure). The proper notion of equality depends on the “right” or value at stake in education finance. Similar, possibly even greater, complexities exist in the media context.

As a minimum, when a poor person and a rich person spend the same amount, fairness would seem to require that the poor get at least as valuable a media product as do the rich. Often that is not the case. For example, advertisers dramatically skew distribution.<sup>199</sup> They “subsidize” media intended for the comparatively affluent to a much greater extent than media designed for the poor. Often, an affluent person will be charged \$.40 for a media product that costs \$1 because advertisers will pay the extra \$.60. Since poor people have less to spend on advertised products, they are worth less to advertisers. Thus, media enterprises must charge much closer to the full cost for media products directed at the poor—maybe \$.95 for a \$1 product. When price discrimination is possible, the poor are sometimes charged more than more affluent purchasers for the same content. Magazines and newspapers, which benefit by being able to present advertisers with high-profile demographics of their readers, promote their publications by offering low price or free “sample” subscriptions in wealthy neighborhoods while charging a much higher “regular” price in poor neighborhoods. Newspapers sometimes purposely design their content to discourage purchases by poor people. Television drops shows that attract huge audiences if their demographics are wrong—too old, too rural, or too poor. The net result is that even beyond their greater wealth with

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<sup>198</sup> See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that unequal expenditures per student does not violate Equal Protection Clause).

<sup>199</sup> This paragraph is based on BAKER, *ADVERTISING*, *supra* note 11, at 66–69.

which to buy media products, wealthy people have their preferred media partially paid for by advertisers.

This subsidy of the wealthy is a strikingly unfair inequality, especially if media content relates to a person's role as a citizen and not merely as a consumer. In *Harper v. Virginia Board of Elections*,<sup>200</sup> the Supreme Court struck down a poll tax.<sup>201</sup> Charging the rich and poor *the same* in order to enter the voting booth was thought to deny equality given that the same "price" placed a greater burden on the poor. But access to media content may be a prerequisite to meaningful exercise of the franchise.<sup>202</sup> Thus, the arguable implication of *Harper* is that media content oriented toward and available to the poor should be subsidized. The reality is the reverse. Media for the affluent receives a significant advertiser-paid subsidy.

Putting advertising aside, equality takes on added complexity because of the "public good" aspect of media content. One conception of equality is that each person should control the same amount of resources devoted to the creation of media content. This conception seems reasonable in many contexts. Equality seems satisfied if each person has the same amount to spend on a car or on food. Even here, however, one might be concerned about this conception of equality. Consider, for example, two people's need for a car—the Los Angeles resident as compared to the New York resident—or two people's need for food—the very large person or the diabetic person with special needs as compared to the physically small person. The needs may be very different. Even more problematically, the more an item has public good aspects, the more equality in individual expenditures advantages people in the mainstream. They get more benefits than others since the combined media expenditures of all members of a group that wants roughly the same type of media content rebound to the benefit of each group member (to the extent of the media content's public good aspect). If ten thousand people are willing to pay \$5 a year for reporting on school board affairs, for \$5, each person gets the benefit of a \$50,000 news program. But the 100 people who will pay \$5 a year for information on Haiti or welfare policy can only expect the benefit of \$500 spent on reporting on these subjects. So for their \$5, people in the two groups get products that cost drastically different amounts to produce. Does this treat them equally?<sup>203</sup>

The lack of equivalence of what people obtain from equal personal expenditures suggests a second conception of equality. Equality could mean that

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<sup>200</sup> 383 U.S. 663 (1966).

<sup>201</sup> *See id.* at 670.

<sup>202</sup> *Cf. Rodriguez*, 411 U.S. at 36 (1973) (noting that a right to a minimum amount of education may be implicit in the right to vote).

<sup>203</sup> Note that this question is not rhetorical. Different, plausible conceptions of equality are available and an emphasis on one or another in a particular context requires defense.

each person gets to have the same amount spent on producing media content which she desires. If the earlier conception is labeled "equality in individual expenditures," this second conception might be called "equality in individual receipts."<sup>204</sup> From one plausible perspective, this second conception of equality is fair. It means that society serves each person's desire for relevant and meaningful enlightenment to the same extent as anyone else's. In contrast, the first, equal individual expenditures, conception could be critiqued as mainstream domination. It dramatically rewards people for being in the mainstream. Thus, if equality means equal respect for cultural alternatives or equal fulfillment (as measured by expenditures) of needs for media content, the second conception is required. On the other hand, more practically, the second conception may seem dramatically unfair—equality in receipts means that members of small groups get to control much more of society's resources per person than do members of large groups.

These contending conceptions of equality have parallels in other areas. The bargaining justified by "democratic interest group pluralism" assumes that the degree that a group prevails should depend largely on its size. The conception of equality suggested by this conception of democracy is "equality in individual expenditures." Similarly, an assimilationist or melting pot perspective is very consistent with each person controlling the same resources spent on media content, because the result, given the public good quality of media expenditures, is a push toward the mainstream. From the democratic pluralism perspective, it is just tough that people with relatively unique tastes have them satisfied less. It would be unfair, possibly elitist, for members of small groups to get more resources *per person* devoted to their preferred conceptions than do members of large groups.

In contrast, a "republican" or "dialogic" conception of democracy emphasizes the adequate development of each seriously advanced (reasonable?) view.<sup>205</sup> The analogous conception of media equality is "equality in individual receipts." Moreover, something like equal expenditures supporting each perspective (*i.e.*, equality in receipts) best keeps alive a cultural pluralism. Both the dialogic conception of democracy and the positive valuation of cultural pluralism would suggest that a person should not be disadvantaged merely because she is different. Society ought to be concerned that people's basic participatory needs for media content be equally satisfied.

My sense is that the demands that "equality of receipts" makes on the community are too great. It would be somewhat unfair as well as unworkable to

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<sup>204</sup> These two conceptions would be equivalent except for the "public good" aspect of media products.

<sup>205</sup> See Jürgen Habermas, *Three Normative Models of Democracy*, 1 CONSTELLATIONS 1 (1994).

stringently follow this conception of equality. Still, this second conception has enough justification, in terms of keeping diverse views on the table and in recognizing the value of difference, that it should be given some policy play. It may justify, for example, some special subsidies for media responding to the interests of small minorities.

### 3. Policy Summary

Markets have no natural or logical priority as a method of giving audiences what they want or, more generally, of identifying and satisfying people's desires.<sup>206</sup> Rather they are one device appropriately used to distribute resources when a group concludes that reliance on a market best serves its values. Often markets are very effective and useful devices. If not constrained by some identifiable resource constraint, most audiences would have many wants beyond those that can be realistically satisfied. Reliance on a market represents a policy choice of a particular resource constraint—a conclusion that satisfying an audience on the basis of its individual members' willingness and current ability to pay is desirable. The possibility remains that using a different resource constraint, which would result in satisfying different preferences, would be preferable. The premise of satisfying people's preferences cannot justify a choice to rely on a market rather than some alternative. This choice can only be made politically. The political choice ought to be made on the basis of normative values and of a society's preferred self-conception. Neither a libertarian nor an egalitarian democrat can accept pure reliance on the market.<sup>207</sup>

Democratic theory supports at least some egalitarian tilt in the distribution of media content. This recommendation applies more strongly the more the media content in question serves political, educational, or culturally constructive roles. The precise content of egalitarianism within this recommendation is partly a matter of societal self-definition. I am presently unconvinced that the choice between conceptions of equality described above has a philosophically correct conclusion. The question is one of situational political ethics, not universalistic political morality. Nevertheless, the coherence of political debate, the capacity of groups and individuals to fully participate, as

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<sup>206</sup> See generally Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980) (arguing that any actually efficient regime, though it may contain private property and free contract rules, must contain these rules in combination with rules drawn from sources opposite to private property/free contract).

<sup>207</sup> See generally Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980) (rejecting the nondistributive conception of contract law and the standard liberal preference for taxation as unjustified methods of redistribution).

well as the progressive need for a society to learn to be adaptable and progressive, requires that reasonable scope be given to desires of everyone, even members of small groups, for satisfactory amounts of media content that responds to their needs or preferences.

Some reliance on markets will surely make sense. Pragmatic arguments for maximal reliance on markets cannot be ruled out abstractly. Nevertheless, even putting aside the critiques of the market in Parts II and III, the discussion here of various egalitarian considerations pushes toward several conclusions concerning media policy.

First, market responses cannot be expected, even if the market worked perfectly, to appropriately create and distribute media content. A claim that a welfare maximization or an anti-elitist or a nonpaternalistic principle supports maximum reliance on markets cannot be justified even if the market works perfectly. These ideological claims are simply wrong. Welfare maximization has no necessary relation to maximization on the basis of an existing distribution of wealth, which is what the market relies on. And to argue against reliance on that distribution does not equate to being elitist or paternalistic.

Second, a more appropriate measure of what the audience wants would rely on a more egalitarian distribution of wealth or of receipts, especially more egalitarian in respect to media content that serves political, educational, and cultural aims. Given inequality and relative material poverty, a democratic society needs significantly greater expenditures on and more equal distribution of these types of media content than the market will produce.

Third, the market will be especially inadequate at providing media content that serves the needs or preferences of smaller groups, and in particular smaller marginalized or disempowered groups. Democratic and egalitarian theory supports extra funding of media enterprises serving these groups.

Fourth, neither abstract theory nor market processes can provide precise criteria for the appropriate degree of support for media content, just as no abstract normative theory can show the precise form of equality or form of society that law should promote. Rather, these are political questions that ought to be resolved by the most legitimate available political processes.

Finally, all these arguments only favor *promoting* media content not produced or not adequately distributed by the market. Nothing said recommends *suppressing* any media content.<sup>208</sup>

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<sup>208</sup> Parts II and III argued that market dynamics and negative externalities result in unjustified amounts of some content being produced and distributed—in some cases, content that contributes to various harms. The economic arguments, however, did not show what response was appropriate, and no response recommended in the policy discussion there suggested “suppression” as I use that term here.

### C. Fulfilling Preferences

The standard claim on behalf of the market is that it provides the audience with what it wants. Even if the distribution of wealth were a fully appropriate criterion for determining whose wants are to be satisfied and even ignoring the problems considered in Parts II and III, a critic of the market could argue either that the market does not properly identify people's preferences or that satisfying these market-identified wants is for some other reasons (for example, paternalistic reasons) inappropriate. This section will explore the first claim.

#### 1. Which Expression of Preferences?

The answer to the question of whether a market works well in satisfying wants or preferences depends in part on how the questioner identifies preferences. It is tautological that a perfectly functioning market responds properly to *market-expressed* preferences.<sup>209</sup> However, people identify and reveal preferences in many different ways and at many different times and in many different contexts. People sometimes identify preferences impulsively, sometimes after self-reflection, sometimes only after discussion. There is no reason to expect these expressions to be consistent. Cass Sunstein emphasizes that influences on the expression include factors such as social norms, social meanings, and social role.<sup>210</sup> As these factors change, either due to changed context or temporal change, a person's expression of preferences is likely to change.<sup>211</sup> Lee Bollinger observes that "[w]e will make different choices and

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<sup>209</sup> A prominent economist once told me that the market provides the only reliable source of information about preferences—about demand. Consider, however, an ugly shirt in the back of my closet that I never wear and that I bought in a drunken stupor—I paid \$25 for it at the store, which apparently means that I, at least then, viewed it as worth at least \$25! That is what this economist must say. A noneconomist might have said that I made a mistake about my preference.

<sup>210</sup> See Cass Sunstein, *Social Norms and Social Rules*, 96 COLUM. L. REV. 903, 928–31 (1996).

<sup>211</sup> Emphasizing how social roles, norms, and meanings affect preferences, Cass Sunstein generates a major critique of law and economics methodology. His primary point is that preferences are not autonomous and are often effectively changed by government action. See *id.* at 947–52. Sunstein generalizes a long standing criticism of standard law and economics methodology—namely, that one reason the methodology is inherently indeterminate in identifying “efficient” rules is that its analysis must take a set of preferences as given, but often part of the issue in the choice of rules is to decide which preferences should count, which are desirable, and which should be promoted. Moreover, since the choice of rule will affect the preferences people have, reliance on any particular set for choice of the rule seems arbitrary. See, e.g., Baker, *Posner, supra* note 67, at 487–93 (1978).



behave differently depending on the context in which the choices are made."<sup>212</sup> His primary argument for media regulation is his implicit answer to the "critical issue," namely, "that people may reasonably want to guard against, or to moderate, certain inclinations they know they have by altering the context in which they will exercise choice."<sup>213</sup>

After reflection or discussion, a person may conclude that savings and investment are vital both individually and for the country. She may vote for greater taxes and expenditures as a form of social investment and she may personally open a savings account. Notwithstanding the above, the day before, like many decent people in her social group, she may have joined the demonstration against higher taxes—her participation showing in part her selflessness, her civic orientation. And the day after, in behavior that may not demonstrate addiction, she may impulsively use her credit card to buy an expensive rug, creating a debt quite inconsistent with her dedication to saving. She might even maintain the credit card debt that charges a higher interest rate than her savings account pays. An observer might say that there is no inconsistency—that her preferences merely changed. However, it is equally likely that each expression would reoccur now in its appropriate context. For example, a person may express (and may know that she expresses) different types of preferences when engaged politically or when voting than when she is engaged in her market purchases. Alternatively, the observer might say that her preferences are just more complex than one might have first guessed. But this argument quickly devolves into the correct point that preferences depend on contextual factors. This means that any reliance on market expression can only identify "what she wants when acting in the market," not "what she wants."

A possible claim is that behavior or, more precisely, a certain type of behavior—market purchases—shows a person's *true* preferences. In contrast, verbal expressions reflect other factors—self-deception, conformity to a superego, politeness, or conformity to social and role norms.<sup>214</sup> However, this claim seems arbitrary. Why should one particular expression be privileged over the other? Why should the behavioral expression that tends to be the most

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Therefore, as a positive analysis, the economics analysis will necessarily be inadequate since either rule that could have been chosen may, if chosen, create the preferences that in retrospect make it appear efficient. See C. Edwin Baker, *Starting Points in Economic Analysis of Law*, 8 HOFSTRA L. REV. 939, 966–68 (1980).

<sup>212</sup> Lee C. Bollinger, *The Rationale of Public Regulation of the Media*, in DEMOCRACY AND THE MASS MEDIA 355, 366 (Judith Lichtenberg ed., 1990).

<sup>213</sup> *Id.* at 366–67; see also *id.* at 363–64.

<sup>214</sup> Verbal expressions (as well as market behavior) sometimes amount to strategic behavior, but I do not list this possibility because of the difficulty of crediting it as behavior that the person might believe to represent her "true" preferences.

impulsive or the most self-centered be privileged over more deliberative, self-reflective or other behavior? Some argument is needed before accepting an emphasis on any expressive form. The issue of identifying the "real" preference probably cannot be disentangled from why the question of identifying which is "real" was asked. That is, "real" may properly mean different things in different contexts. Then the question is: Is one or another context more basic? Surely people believe that various, different contexts should be part of life. Again, the point is that privileging one over another, without argument or reason, is arbitrary.

Still, argument concerning which expressions of preference are most basic can be made. An advocate's identification of a particular type may reflect her conception of what it means to be a person—but people may vary in their conception. Some people consider capacities for reflection and deliberation as among the most defining and distinctive attributes of being human—and, if so, they would presumably give these qualities and their expression priority. Alternatively, persuasive arguments might show that at different moments, maybe in relation to different issues or different objects, people ought to privilege different methods of indicating preferences. For example, impulse may be the best way to choose among ice cream flavors but not among political candidates. I no longer remember which intellectual icon my mother quoted as saying that reason is fine for unimportant decisions but for something as important as a career or a spouse, intuition ought to prevail. (Not that she convinced me.) Alternatively, maybe a person needs to achieve a wise integration of methods of identifying and expressing preferences, commitments, or values. Or maybe, even if all methods of indicating preferences are fundamental to being a person, ordering principles could resolve (some) conflicts. For example, since a person's wealth and the form of exchange opportunities are dependent on the legal order, and since the choice of legal rules that create the legal order occurs in the context where all people are implicitly equal, maybe the political expression should have priority over the market expression.<sup>215</sup>

Since societal structures are created by human behavior, existing structures could be read as evidence of people's beliefs about the form of expression of preference with which they ought to be identified. Thus, in areas where governmental choices now prevail, maybe people consider political (or lobbying-based) expressions as basic and market expressions as mere epiphenomenal. This account, however, has the same problems of positivity and circularity as did merely taking market expressions as people's "real" preferences. It reifies the status quo. Although some of the existing order surely reflects people's commitments, others aspects are the product of injustice and

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<sup>215</sup> See, e.g., Baker, *Ideology*, *supra* note 67; Bollinger, *supra* note 212.

domination; and some aspects may reflect structures, like the market, that when left alone operate according to their own autonomous logic in a manner independent of human values.<sup>216</sup>

People disagree. The propriety of relying on any particular expression of preferences is always contested just as are claims about the propriety of differing institutional arrangements. Presumably, a rational view would be that different expressions should prevail for different issues and in different contexts. The choice of what forms of expression of preferences ought to rank highest in particular contexts is clearly a matter of self-definition and commitment. For individual self-definition, possibly the individual invests more of her identity in particular expressions. Still, determining which expressions shall prevail socially is *inherently* a matter of collective choice. All arguments that identify democracy with self-government or self-determination suggest that as to this fundamental question, dialogue, reflection, and democratic expression ought to rule. In other words, granted that the audience ought to get what it wants, whether people best or more accurately identify what media content they want by their expenditure decisions in the market, by their political behavior, in some combination, or by other means has no logical answer. Presumptively, however, the prevailing answer as to which expressions of preferences to valorize ought to result from and be open to revision by democratic processes.

## 2. *Preferences About Preferences*

The problem of determining which expressions should prevail is pushed further by asking: Do people always prefer their (existing) preferences to prevail? Fulfilling preferences may be an inadequate or under-specified description of people's goal. People have preferences about their preferences. A person can want to be a certain type of person even though she is not (yet) that person.<sup>217</sup> She can both want a cigarette and also want to be a person who does not want to smoke; she can want to be a person who easily talks to strangers but, because she is not yet that person, does not now want to talk to a stranger. These are not merely conflicting preferences—like wanting to go both to the movies and to the lecture tonight. Rather, this situation concerns the person's view of the merits of even having one of her preferences.

And, of course, the same can be true of groups. A community can want to become a certain kind of people. There exists in the collective case, however,

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<sup>216</sup> See JÜRGEN HABERMAS, 2 *THE THEORY OF COMMUNICATIVE ACTION* 318–23 (1984).

<sup>217</sup> See Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5, 7 (1971).

an obvious danger that the sought-after frame is really an attempt by some to impose their orientation on others—which provides one important reason to distinguish policies that encourage or reward change from those that coerce conformity or that punish deviance.

People value media content for serving different purposes. Broadly, media content serves to entertain or divert, to energize or engage, to educate or inform, and to transform. Although the same media content may do each, particular content is likely to serve particular functions much more than others. And at different times, a person is likely to be primarily concerned with one or another role. Of course, she usually would not object if the content she seeks for one reason effectively contributes to other functions. Sometimes, however, content chosen for one purpose will disserve a person's other goals.

Probably the best standpoint from which to evaluate how well media content "entertains"—the first function listed above—is how well the content satisfies present preferences. Of course, even a person's concern with entertainment may not be quite so flat. Some people, at least some of the time, feel they have not been satisfactorily or really entertained unless the entertainment leaves a puzzling or potentially transformative after-taste. A person can also value purported entertainment in peculiar ways. She could attend the string quartet's performance not so much because she currently takes pleasure in it, but because she expects attendance will help develop her capacity for a richer or deeper (or merely different) pleasure than those she now experiences, or attend in the hopes of learning to enjoy that which she thinks is enjoyed by people like the type of person she wants to become. Moreover, severe informational problems cause reliance on present preferences not to unambiguously imply reliance on the market. In choosing any product, a person might guess wrong. These informational problems are often particularly acute in relation to media products. Knowing whether one will like reading an as-of-yet unread book is usually harder than knowing whether one will like wearing an as-yet unworn shirt. Still, a person's market expressions of her entertainment preferences (ignoring the problems with the market described in earlier sections) may be the most practical way to achieve results approximating "what she wants."

The other listed purposes of the media—to energize, to educate, to transform—are easily viewed in a dynamic way. A person values media content that serves these functions in part because of changes in herself that she expects her consumption will prompt. In other words, she values educational or energizing or transformative content in part for creating or changing her preferences or values. She may value First Amendment protection of demonstrations because it results in her being confronted with expression she would otherwise choose to avoid but with which she thinks she ought to be

confronted. "What the person presently wants" may seem an odd standard for evaluating material whose value lies in changing the person's preferences. Few parents, for example, believe in leaving a child entirely unguided in her choice of educational directions or even food choices—even the most permissive will usually take care that materials they consider appropriate are available to the inquiring child.

Coerced educational paternalism should apply to kids, if anyone. Respect for people's agency argues in favor of having an individual's preferences or choices control even in respect to media content performing these transformative functions. The adult should be free to choose when and if she wants to be educated or transformed and free to choose the materials or instructors or activities that she believes will best perform these roles. She often knows that she is not now in a position fully to know what it is that she wants to know or to become. She can then, within the market, carefully choose agents of change—whether activities or instructors or editors of media content—that she believes will best serve her purposes. That is, a consumer often privileges certain agents of change that are available in the market.

Alternatively, she might rationally privilege certain nonmarket mechanisms for choosing some agents of change. Thus, she might, instead or in addition to market purchases, support government subsidies for public radio or the National Endowment for the Arts. This is key. Because people know how they behave in markets or because they understand certain troublesome structural tendencies of markets, they might conclude that government subsidies of nonprofit entities, special structural rules that refashion market entities, or other forms of government intervention will more likely result in her obtaining the content that she desires, especially more likely as to material supportive of desired transformations, than would total reliance on markets.

A person is necessarily faced with the question, which may be answered by default, of whether an unregulated and unsupplemented market or, instead, whether various nonmarket mechanisms, changes in market structures, and market supplements, will most likely provide the content that best serves her goals. There is no inherently right answer. But in answering this question, she should consider not only the market's predicted ability to satisfy market-expressed preferences. She should also consider whether the transformations she desires for herself are most likely given reliance on market-expressed preferences in contrast to various alternative expressions registered by alternative mechanisms.

### 3. Market-Generated Preferences

Initially, this section asked whether expressions of preferences elicited by the market should have priority over other expressions elicited by other means or in other contexts—and found no general reason for such a priority. A second question considered the propriety of the market given people's concern with what their preferences will be. An important observation related to the second question is that people's preferences are never entirely exogenous to social processes. However, the preferences encouraged by these social processes bear no necessary relation to the preferences that a person wants to develop. Therefore, a person's concern with what her preferences will be implies a need to be able to make choices about the social processes that will, themselves, influence her preferences.

Profit-oriented firms in competitive markets use market-based media to encourage predictable types of preferences—preferences for the firm's products. The media's role is central, both as carriers of ads and as products themselves. When carrying product ads, the media are being paid to encourage preferences for the advertised products.<sup>218</sup> When carrying corporate image or editorial advertising, the media encourage a more general set of profirm or pro-industry attitudes. Michael Schudson, despite his signature iconoclasm illustrated by his skepticism about advertising's direct effectiveness and about the wisdom of those in the advertising industry, describes advertising as

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<sup>218</sup> Professor Shiffirin argues:

[T]he promoters of the materialist message benefit from an almost classic case of market failure. Advertisers spend some sixty billion dollars per year to disseminate their messages. Those who would oppose the materialist message must combat forces that have a massive economic advantage. . . . The inequality of inputs is structurally based.

Steven Shiffirin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1281 (1983). Shiffirin's characterization of this as a market failure may be debatable, but he is certainly correct that the bias is structural and that collective rejection of this bias could be a justification to limit "commercial speech" even though individually based speech of the same content were allowed (and constitutionally protected). The bias is illustrated by comparing the amount spent on "marketing" candidates and products. In 1996, all of the candidates for President and Congress, together with their supporters (often "soft" money), spent an estimated \$2 billion on their campaigns. Meanwhile, in 1995, a single company, Proctor & Gamble, had an ad budget of \$2.78 billion, followed by Philip Morris at \$2.58 billion. See R. Craig Endicott, *Leading National Advertisers*, ADVERTISING AGE, Sept. 30, 1996, at S3; David E. Rosenbaum, *In Political Money Game, The Year of Big Loopholes*, N.Y. TIMES, Dec. 26, 1996, at 1.

"capitalist realism."<sup>219</sup> That is, he emphasizes advertising's ubiquitous cultural contributions that help create or naturalize particular sets of attitudes.

Beyond creating preferences through the content of advertising, advertisers influence preferences, values, and knowledge in a second way. Advertisers and audiences combine in paying for media producers' efforts. As one of the purchasers, advertisers' preferences influence the content of even the nonadvertising portion. And, their influence has predictable biases. They typically prefer the following: content that is not critical of their products or their corporate activities; content that encourages a buying mood (which often means an uncritical mind-set); content that does not alienate any relevant group of potential customers; and formats and content that appeal to or create audiences that advertisers see as appropriate for their marketing goals.<sup>220</sup> Directly through their advertising messages, but also indirectly through their "corruption" of the journalistic or creative process of providing nonadvertising content, advertisers encourage people to be a certain type of person—a person who constantly wants more material goods or commercially provided services and who, when faced with characteristic life problems, responds with purchases as the cure-all for every dilemma.<sup>221</sup> The shallowness and potential dangerousness of this view of the world should be obvious. However, I will not here try to critique this culture or set of preferences or even further defend my claim that this is what advertisers encourage. Rather, I will turn to consider what effect competitive media markets, even if purged of the corrupting effects of advertisers, can be expected to have on preferences.

Independent of advertisers, profit-oriented media enterprises operating within a market framework<sup>222</sup> have incentives to cultivate certain types of

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<sup>219</sup> See MICHAEL SCHUDSON, *ADVERTISING, THE UNEASY PERSUASION* 5–6, 209–33 (1984).

<sup>220</sup> See BAKER, *ADVERTISING*, *supra* note 11, at 44–70; JOSEPH TUROW, *BREAKING UP AMERICA: ADVERTISING AND THE NEW MEDIA WORLD* (1997).

<sup>221</sup> Patent medicines were once "able" to cure any malady but it is not clear that modern ads are any less all-encompassing, even if they are sometimes more subtle, in showing how their product solves the most pressing problems confronting people with money to spend. Turow describes the typical advertisement: "[I]t portrays a world of the intended audience, a problem in that world, and actions that show how the product can solve the problem." See TUROW, *supra* note 220, at 22.

<sup>222</sup> The notion of an unregulated market is a misnomer—property and contract law are themselves regulations. See Kennedy & Michelman, *supra* note 206. Legal rules inevitably affect the cost of creating preferences. For example, tax laws *increase* a firm's incentive to spend money on preference creation (on advertising) rather than on preference satisfaction (on production) by treating advertising as entirely a current expense (currently deductible, even though its value to the firm often lasts for several years) while investment in production equipment must be depreciated (deducted) over a period of years. See George Mundstock,

preferences (or persons) more than others—namely for media content that the firm owns, controls, or has a positional advantage in producing. In economic terms, the media firm has an incentive to devote resources to creating these particular preferences until the marginal expenditure on the preference creation equals the marginal gain *to the firm* of creating those preferences.<sup>223</sup> (Of course, as by-products or “industrial waste,” media firms also sometimes spark preferences or world views that have no explicit value to them.) This incentive should encourage three or four tendencies, which will not necessarily push in the same direction.

First, everything else being equal, a firm has a greater incentive to arouse more cheaply cultivated desires or preferences. If generating an appreciation for some type of cultural or informational item is difficult, the expenditure on creating the desire is less likely to be worth the cost.

Second, the size of the group in which a given promotional effort can effectively stimulate a desire will vary for different desires. The same promotional costs (for example, the cost of coming up with the advertising plan) may exist no matter how many “stimulated” or “influenced” purchasers these costs are spread over. Therefore, the media firm is better off promoting preferences for those media products with potential appeal to the larger audience. Of course, sometimes promoting niche products can be profitable. The point is that the expense of creating a desire for a product that will become widely desired is more likely to be economically justified than a similar expenditure that only creates a narrow demand. Most often this structural feature encourages promoting lowest common denominator preferences. The market gives the firm the most “bang for the buck” for “dumbing down” the audience and the culture.

Possibly most important is a third tendency. An enterprise must consider its ability to capture the potential entrepreneurial benefit resulting from any demand it creates. Colgate’s parent firm can capture much more of the desire for Colgate toothpaste than it can of a desire for more healthy tooth brushing. Even if the second type of ads would stimulate more gain to toothpaste companies as a group (or to society), unless Colgate can turn the pro-tooth-brushing ads into self-promotion (for example, by appearing to be a responsible company) or unless it has a very high percentage of the toothpaste market, it usually will be better off investing in creating the first preference—a preference for Colgate toothpaste. Similarly, a copyright holder can capture more income

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*Taxation of Business Intangible Capital*, 135 U. PA. L. REV. 1179, 1201-04 (1987); Lawrence Summers, *A Few Good Taxes: Revenues Without Tears*, NEW REPUBLIC, Nov. 30, 1987, at 14.

<sup>223</sup> These same incentives exist for nonmedia firms, but here the focus is on examples from the media context.



by encouraging a desire to watch *Mean Streets* than from a desire to go for a walk on the mean streets. The Walt Disney Co. benefits more from people enjoying Fantasyland than from their enjoyment in engaging in imaginative fantasies (particularly if their fantasies do not require specific commodified props). To a significant degree, the first two tendencies operate only under the dominance of this third factor. A firm gains little from creating preferences unless it is in a position to profit from their existence. Thus, the market incentive is to create preferences for monopolized qualities of products rather than generic aspects of life. And there is no incentive to generate desires (or capacities) to engage in activities or to have preferences unrelated to saleable products or services.

Any choice for or against reliance on an unregulated market would be uninformed without some thought about its tendency to create certain preferences. For example, I earlier discussed how the market, combined with existing copyright law, creates an incentive to generate a demand for a broadcaster's news anchorperson or her chatter rather than for uncopyrightable news content.<sup>224</sup> The same incentives provide the economic rationale for creating the "star" system.<sup>225</sup> The long history of serialized stories provides an equally interesting illustration of the combination of easily aroused preferences with monopolistically controlled elements. Movie producer's repetition of story names and characters and broadcasters' soap operas duplicate a profitable approach pioneered by book publishers, newspapers, and then magazines. By creating demand for a program series or, even more dramatically, for particular television soaps, the firm guarantees a continuing demand.

In each case, it is crucial to recognize that the market creates not only an incentive for a firm to produce items that it owns (or controls), but also an incentive to create preferences for these items. In the star system, for example, the firm benefits by cultivating preferences for particular actors under contract. Even better, it benefits from preferences for star cartoon characters, created by employees of the media firm, since the firm does not have to renegotiate the cartoon characters' contracts or worry about their potentially embarrassing off-

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<sup>224</sup> See *supra* note 32 and accompanying text.

<sup>225</sup> A second element of "brand" identity—including serial publications, story serialization, stars, prominence of book authors or movie directors—is its capacity to reduce the audience's informational search costs, a reduction based on the premise that the brand continuity correlates with quality continuity. This feature gives products with the brand identity a competitive advantage, although the advantage may not correspond to the media products that the audience would have wanted advantaged if they did not have to worry about search costs. This point, although related, is separate from the concern discussed in the text about the economic incentive to create preferences for particular types of content.

job activities or their untimely death.<sup>226</sup> Most observers concede that to become a star “requires a modicum of talent,”<sup>227</sup> but still emphasize that “successful [stars or performance] groups . . . are made.”<sup>228</sup>

Creation of preferences for the firms’ “owned” products can have significant cultural effects. In encouraging an emphasis on uniquely engaging video for broadcast news, an effect that may be in decline as broadcasters economize by using syndicated video feeds, copyright law causes broadcasters to benefit by nurturing a desire for this ownable format rather than a desire for depth reporting. The star system arguably teaches a form of individualism that towers over emphases on social or structural forces in either news or dramatic stories. It also may encourage economically wasteful amounts of individual effort toward becoming a “star” by people who will not succeed at that but who could have been very successful at something else.<sup>229</sup>

A possible fourth tendency in market-based media’s effect on preference or value creation may be to foster values and perspectives that are held by those who control the creation of media content or, more cynically, that benefit those in power when held by audiences.<sup>230</sup> The increasing national and global concentration of media ownership into the hands of five to ten megamedia giants creates the danger that these few owners will guide development of political (and presumably cultural) preferences along their preferred lines—what might be called the “Berlusconi danger.”<sup>231</sup> Fully competitive markets might mute this danger—markets might force production along lines dictated by economic efficiency. However, many media enterprises, especially entities like most daily newspapers and television stations that have some degree of monopoly power, produce extraordinary operating profits. These profits leave

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<sup>226</sup> See Madow, *supra* note 50, at 191–96.

<sup>227</sup> BOGART, *supra* note 32, at 227.

<sup>228</sup> *Id.* at 228 (quoting recording executive). Of course, the market does not push toward this result unaided by law. Law, for example, affects the drift toward a star system by recognizing a “right of publicity.” See Madow, *supra* note 50, at 130.

<sup>229</sup> See FRANK & COOK, *supra* note 50, at 101–23; Madow, *supra* note 50, at 216–17.

<sup>230</sup> Although referring more to its general cultural content than to its political valence, Bogart asserts that “those who produce [the commercial culture] often prefer not to consume it themselves. . . . The crowning condemnation of the media system is that it is engaged in a cunning and deliberate exploitation of public foibles by people who know better.” BOGART, *supra* note 32, at 231.

<sup>231</sup> Cf. Alexander Stille, *Media Moguls*, *United*, N.Y. TIMES, Aug. 28, 1995, at A15 (arguing that Congress’ moves to deregulate media ownership will contribute to growth of media conglomerates that will increasingly control politics). See generally BAGDIKIAN, *supra* note 62. As Italy’s major media magnate, Berlusconi relied heavily on both enormous wealth and media ownership to become Prime Minister of Italy—with his media ownership itself subsequently becoming a major issue put to vote in a national referendum.

considerable room for media barons to indulge their own preferences. Often both their preferences and the most profitable use of their media properties relate to securing and exercising political power.

Policy analyses usually begin by identifying likely impacts of particular structures. I have suggested four tendencies that are likely to influence significantly the preferences that a market-based media fosters. If these suggestions are right, critical policy questions become: Are these the preferences that people want to have? How powerful is the market-based tendency for these to be created? What alternatives are there?

The first question, what preferences do people want to have, again raises the issue noted earlier: Which expressions of desire ought to control for these purposes? The crucial factor here is that when the concern is how the (market) structure encourages certain preferences, there is little opportunity, no standpoint, *within* the market to reject the structure. This choice can only be made from outside, presumably from within the political realm. Moreover, this standpoint is suggested if, as I suspect, most people's image of both what it means to be human and how they conceive of themselves requires that they view the identification of the type of preferences they want to have, and the type of person they want to be, a matter for reflection rather than impulsive or consumerist consideration. Arguably, discursive processes are much better than market practices for eliciting the most thoughtful expressions. More fundamentally, the notion of democracy is founded in a commitment to both people's equality and their agency. The first commitment suggests that these are issues about which all should have a say, an equality not represented by market processes. The second suggests the necessity of political choice rather than leaving the outcome to the autonomous logic of a system that operates according to its own logic. Thus, self-reflective, presumably dialogically developed, democratically expressed answers, should have priority.

If asked, if making a political choice, a person may well not identify with the type of person that the market predictably encourages, but this depends on what she would choose to become. The market may work fine if she wants to be ever more caught up in consumer culture. But if not, she may be disinclined to choose the market as a primary agent of preference creation. If people do not want to become the type of person that the market encourages, what would they want instead? Many broad alternatives could be sketched. For instance, my guess is that many people's self-conception is as a person who would prefer to appreciate a broader range of cultural phenomenon at more complex levels and with higher levels of enjoyment, a person who lives a culturally "richer" life, a person who is constantly increasing her understanding of both herself and the world, and a person who (either individually or as part of political communities) makes better choices about both the social and physical world.

Many people would like to be more reflective, more self-reliant, more politically energized, more responsive to the needs of others, and more interested in being informed. And many want to be inspired and spurred to responsible social and political activity. For these transformations, the operation of the market is likely to be inadequate. Of course, a preference to be encouraged or taught to become such a person does not end what many people hope to get from the media. Entertainment is extraordinarily important.

The four tendencies described above will not give market entities any particular incentive to fulfill such a desire to become an "improved" person or for society to become a "better" society. The question then is: What structure would? Presumably an alternative structure must either rely more on nonmarket based incentives or more on systematic modifications of market incentives. Broadly, two sorts of nonmarket incentives seem most relevant: (1) people's or collectivities' internal incentives to remain true to personal or professional values or standards; and (2) material or status incentives granted independently of the economic marketplace. Legal policy greatly affects the extent that these alternative incentives exist and are behaviorally effective. As for internal incentives, their role could be enhanced by laws that either mandated or provided greater opportunities for varying structures of control within the media industries. Law could make it easier or harder for journalist-owned or nonprofit foundation-owned media entities to exist. Law could encourage or require that journalists have a greater say in content decisions—recognizing that not only government but also owners and markets should not "intrude" into the function of editors.<sup>232</sup> The law could prohibit the "repression of [editor's] freedom by private interests"—specifically, by corporate owners which are "nongovernmental combinations" that should not be allowed to "impede the free flow of ideas."<sup>233</sup> As for material incentives that are independent of the market, the legal order can provide subsidies to varying production activities and status systems or can tax other market practices.

This section claims that reliance on such techniques could result in the production and consumption of media content more in line with people's preferences than does the unadorned market. The claim is premised on a number of observations and preliminary assertions. It embodies observations that alternative expression of preferences—expressions made within different contexts or through different structures—exist and that these different expressions may differ and partially conflict, that one important set of preferences relate to what type of person a person wants to be and to what type of society people want to have, that reflective or discursive (as opposed to market) expression of these preferences ought to be privileged, and finally, that

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<sup>232</sup> *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

<sup>233</sup> *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

the market will be inadequate to the extent that people would choose to be different from what the market, operating on its own internal logic, would try to make them.

## V. WHERE TO?

The market cannot be expected to provide the audience what it wants. That is my primary conclusion. This conclusion directly conflicts with the deregulatory mood that has swept the country over the past two decades. It directly conflicts with recent moves to reduce rather than increase the funding for public broadcasting, for the humanities, and for the arts. It has direct implications for postal and telecommunications policy. It weighs in on virtually all media and communications issues that the country has taken up—and implies that there are additional reform issues that should be raised.

I have made no attempt at empirical measurement. Nevertheless, the claim is that the failure of the market described here is not marginal. The divergence between what the market produces and what people want can reasonably be expected to be massive. Improvement requires large-scale and multifaceted government intervention. Each section pointed to a different set of problems.

Part II focused on the “public good” aspect of media content. After someone creates media content, anyone can “consume” the content without any lessening of its availability for consumption by others. This possibility of “nonrivalrous use” justifies the prediction that, at least assuming media firms’ inability to price discriminate fully, the market will drastically underproduce and inefficiently supply media content. The public good aspect also leads to natural monopolies of particular media products. Appropriately applying monopolistic competition analysis and again assuming inadequate price discrimination, the prediction follows that the market success of some media products will not be justified. Rather, their success will cause the failure or nonproduction of other more valuable media products. In other words, market competition can lead to inefficient results that disserve audiences.

Part III emphasized that “what someone wants” has economic significance only in relation to some budget constraint—only in relation to its cost as well as the person’s wealth. Even if on a given evening someone would love to see *Our Town* performed live by her favorite Hollywood stars in a superbly refashioned local theatre, she may “prefer” a free television offering or a \$8 movie given how much each alternative costs. A person’s fantasies about what she abstractly “most wants” may be important for self-exploration and provide useful insights, but for economic or policy purposes, the inquiry usually takes place within the context of a budget constraint that makes proper price assignments crucial. Thus, any claim that the market gives the audience what it wants must mean

“what it wants” given the cost of the items that it receives. That is, the claim must assume that the audience is charged no more or no less than the cost of providing the product.

The existence of significant externalities casts doubt on the “efficiency” or welfare-promoting quality of a market. Of course, virtually all economic activities produce some externalities, a fact that may provide a general reason to be suspicious of blind reliance on markets. In many contexts, various legal devices effectively internalize what otherwise would be major externalities;<sup>234</sup> those that remain may be less significant. However, the media sphere is different. Part III argued that the production and, even more, the consumption of media content create huge and vitally important positive and negative externalities. For example, the quality of democracy as well as a considerable amount of criminal violence are arguably in large part externalities of media products. Because of the market’s failure to internalize such externalities, audiences are charged much more or much less than the real cost for many media products. People appear to demand, and they consume, a much smaller quantity of media products that have positive externalities than they would if these media products were properly priced. The reverse is true for media products with significant negative externalities.

Part IV rejected the adequacy of the market’s determination of audience preferences. First, it challenged the propriety of relying on a particular budget constraint—the existing distribution of wealth—to identify what people want.<sup>235</sup> A democratic society should fulfill, at least up to a certain level, people’s desires for some types of media content irrespective of their ability to pay. Consequently, the market can be predicted to underproduce and overcharge for media content, especially “edifying” content desired by the poor and, maybe, by members of some “marginal” groups.

Part IV also observed that people express different preferences in different contexts. Moreover, the very institutional structures that measure preferences often strongly influence (if not create) these preferences. To the extent the

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<sup>234</sup> Mandated internalizations of costs generated by media products are often inconsistent with the constitutional ideal of a free press (for example, consider imposing liability for all libels or for creation of emotional stress or violations of privacy). Society could, however, decide to provide compensation for some of these harms out of general tax revenues without abridging any notion of the First Amendment. Possibly, it could even raise money for the compensation from a general tax placed on the media since this would not suppress any particular content and it would be a cost related to media production. *See generally* Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992) (examining the possibility of reassigning the costs of a free speech system in a way that would achieve the dual goals of retaining a strong free speech system and lessening the disproportionate burdens of that system on those who have historically paid for it).

<sup>235</sup> This constraint had been accepted for purposes of the analysis in Parts II and III.

market operates autonomously, its creation of preferences is independent of people's commitments and value choices. For these reasons, the propriety of primary reliance on market elicitation of preferences is doubtful. Market expression and creation of preferences significantly reflect the autonomous logic of a social subsystem—the market—rather than people's discursive and reflective practices. More dialogically elicited preferences, possibly more politically expressed preferences, arguably have a better claim to priority. At least if people's preferences as to which expressions should have greatest weight and their preferences as to what type of preferences should be most encouraged are to control, then they must be able to act outside the market to determine the extent of this institutional framework's role.

In sum, from the perspective of providing people what they want, media markets are subject to the following criticisms. They provide much too much "bad" quality content—bad meaning content that has negative externalities.<sup>236</sup> They also may produce a wasteful abundance of content responding to mainstream tastes.<sup>237</sup> Otherwise, the main problems are underproduction. Markets predictably provide both inadequate amounts and inadequate diversity of media content.<sup>238</sup> Especially inadequate is their production of "quality" content—quality meaning content that has positive externalities.<sup>239</sup> Likewise, civically, educationally, and maybe culturally significant content preferred by the poor is inadequate.<sup>240</sup> Moreover, smaller groups will often be served inadequately, either in relation to democracy's egalitarian commitments,<sup>241</sup> or due to the consequences of monopolistic competition.<sup>242</sup> Finally, the market is unlikely to reflect people's arguably more mature or more considered conceptions of the content they want, especially of the content that relates to the type of people they want to be.<sup>243</sup>

No single policy will provide an adequate response to the market's inadequacies. Moreover, the extent of the inadequacies is not subject to objective measurement for reasons that are not merely technical. Both the balance and weight to be given various externalities are matters of normative dispute. For example, in a latter article, I intend to show that the choice between various media policies, as well as between various styles of journalism, will implicitly reflect a choice between various opposing conceptions of

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<sup>236</sup> See *supra* Part III.

<sup>237</sup> See *supra* Part II (concerning ruinous competition).

<sup>238</sup> See *id.*

<sup>239</sup> See *supra* Part III.

<sup>240</sup> See *supra* Part IV.

<sup>241</sup> See *id.*

<sup>242</sup> See *supra* Part II.

<sup>243</sup> See *supra* Part IV.

democracy.<sup>244</sup> Therefore, here I will only offer comments about the broad directions and general principles of possible intervention.

Given the tendency to massively underproduce content that ought to be considered "good" or "useful" or "edifying and enriching," policy discussions ought first to consider what types of content falls into these categories. This contentious discussion should recognize that this "good" material will differ for different people—and the market will most dramatically fail to provide such material in relation to the needs and preferences of the poor and members of marginal groups. This failure is an aspect of institutionally based oppression. One response would be not to identify categories of good content but rather circumstances where people who are making decisions about content are most likely to be thoughtfully attempting to choose "good" content and then to subsidize those decisions. In any event, the government ought to mandate or encourage structures, grant subsidies, or generate economic incentives that are likely to encourage production and distribution of such valuable content.

Useful subsidies can take many forms. Possibilities include: direct subsidies for non-market-controlled production of content, such as public broadcasting; mail or tax subsidies for content produced by nonprofits and ideologically oriented organizations; support for professional journalism education, which could increase the supply of creators of quality content and hopefully increase the likelihood that producers will resist mere market pressures to debase production; subsidies given through entities like national and state endowments for the arts and humanities to support both creation and delivery of cultural materials; support for public libraries; and support for media literacy education that could increase the relative demand for high quality content. Although there is room for debate, the implication of the analysis in this Article is that each of these should receive much greater governmental support than it has in the past. In contrast, recent moves have been in the direction of reducing public support for each.

Beyond subsidies, equally appropriate are policies directed at encouraging the allocation of decisionmaking control over content creation to people with commitments to quality rather than merely to the bottom line (for example, the content creators themselves or decentralized control by people involved in the media enterprise). This goal, for example, supports a drastic revitalization of antitrust enforcement in the media area, with the policy being guided by First Amendment concerns that go beyond traditional market analyses.<sup>245</sup> It also supports the following: the long standing FCC policy of favoring license grants

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<sup>244</sup> Cf. Habermas, *supra* note 205.

<sup>245</sup> Cf. Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1051 (1979) (calling for the courts to consider not only the economic approach to antitrust, but a political values approach as well).



to applicants whose principals live in the community or, even better, whose principals were themselves involved in management; tax policies that favor family ownership rather than, as was long the case, that favor sale to conglomerate interests; labor laws that favor a stronger editorial voice for workers; and business organization laws that favor media ownership by workers or nonprofit organizations.

The above suggestions are merely a beginning. The three key claims are: First, massive subsidies of a wide variety of sorts are justified. Second, rules relating to the distribution of decisionmaking power are appropriate objects of attention, not with the goal of making media entities more responsive to the market (which is the typical goal of much policy discussion) but with the goal of making them more responsive to the goal of creating "quality" content. Third, in discussions about particular proposals, attention to market considerations should not divert the focus from more important normative or evaluative choices. As suggested in Part IV, these collective-definitional choices about how to supplement and how to sculpt the market ought to be the center of media policy.

These policy guides have focused on responses to the market's failure to provide enough quality content. The issue of too much "bad" content also cries out for attention. In fact, probably the most common political reaction to the mass media is to identify and then attempt to suppress or restrict popularly conceived "bad" content. In contrast, the civil libertarian premise warns that suppression is seldom the wisest or most effective way to handle a social problem. This premise about the imprudence of suppression applies even more forcefully to laws that would prohibit activities, like gaining access to freely produced media content, that people plausibly view as aspects of their basic freedom.

Virtually inevitable uncertainties warrant great caution concerning any form of suppression. First, often people will disagree about whether to characterize some media effects as good or bad. The ideals of liberty and democracy imply opportunities for collective promotion of majoritarian conclusions, but suppression of minority views contradicts these ideals. A second uncertainty concerns the inevitably speculative quality of trying to predict the quantity of various "bad" effects that can properly be attributed to the media. Even given certainty that media portrayals of violence lead to some antisocial violence, it is still important to know, how often? And what is the content's value to those who are not led to violence (or even to those who do commit the violence)? These inquiries are important because a portrayal's bad effects should be weighed in a balance that also considers any good that it does.

Once this point is noted, an array of additional questions opens up. For some of the audience, do these portrayals lead to a revulsion against violence

and, behaviorally, to reduced violence by some people? For other people, do the portrayals lead to increased readiness to resist unjust oppression—do they, in part, promote a liberating psychology? Of course, also relevant would be whether they promote wise or self-destructive resistance to oppression. Will bad consequences that are now attributable to particular bad content become, if that content is suppressed, attributable to other, nonsuppressed content—will suppression be effective at reducing evils? Even if the net effect of some content is bad, how often will content with net social benefits also be suppressed because mistaken for that without social benefits? Or how often will this content be discouraged out of fear that it will be so identified? Whose evaluation of these costs and benefits ought to prevail? Given the complexity and variability of responses to any specific content, is the “real” problem not the content but the failure of society to adequately educate people to be good media “readers” of violent content? In contrast to education and transformation, would suppression be a disempowering and ultimately less effective response to the problem of media-stimulated violence?<sup>246</sup> Or is a more serious problem—the “real” problem—the set of commercial incentives given to media creators and producers who, if given the opportunity, would have often chosen to produce richer, more complex, and potentially more beneficial content. If this is the problem, is suppression misdirected as compared to policies directed at changes in the structure of incentives or changes in the structure of who gets to make content decisions?

These questions are not meant to be paralyzing. People continually do make decisions reflecting their beliefs about net consequences of materials as well as their views about the quality of media content. They are likely, especially if empirically informed, to do so relatively intelligently. But it is disquieting that the more popular policy route, the easier approach for the political entrepreneur, is to focus on (purportedly) objectionable material and to respond with calls for suppression. Positive alternatives often involve greater programmatic complexity. Promoting them requires greater, and more difficult, explanatory effort. Implementation often requires expenditure of resources that overtly come from taxpayers. These features can generate opposition from those with wealth or property and provide opportunities to nitpick proposals and to obscure real issues. Is this in part what happened in 1993 and 1994 with the

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<sup>246</sup> Some research indicates that viewers of violent sexual videos, as compared to nonviewers, have more aggressive attitudes toward women and unsympathetic attitudes toward rape victims, but viewers of the same videos followed by appropriate debriefing have greater sensitivity toward issues of violence toward women than they had before seeing the videos. See Daniel Linz & Edward Donnerstein, *The Effects of Counter-Information on the Acceptance of Rape Myths*, in *PORNOGRAPHY: RESEARCH ADVANCES & POLICY CONSIDERATIONS* 259, 263–67, 284 (Dolf Zillman & Jennings Bryant eds., 1989).

health care debate? And surely it occurred repeatedly in response to proposals to require greater expenditures on quality television for kids. The paucity of good children's television is obvious. But rather than attempt to create more good material for which there is an apparent consumer demand, the more vocal political response is to be repressive. First, the response was to ban indecency. More recently, it has been to use societal resources to manufacture V-chips and to apply "ratings" to help people engage in private censorship, despite a lack of good evidence that they will use the censorship technology when made available.<sup>247</sup> In addition, the FCC has now taken steps to implement the 1990 Children's Television Act by requiring stations to provide children three hours a week of educational programming.<sup>248</sup>

In sum, practical considerations suggest avoiding suppression as the regulatory route. Suppression contradicts important noneconomic values, is often likely to produce worse externalities than those it suppresses, and can reduce important positive externalities. Advocacy and implementation of suppression often divert attention from more serious problems and divert creative energy from finding more complex, usually structural, but more meaningful solutions. Moreover, this diversion may have a class-based bias. The more intelligent responses will often involve changes in property rights and structural rules while suppression will seldom significantly limit opportunities desired by the wealthy. Clearly, however, one way to reduce the influence of "junk" is to increase the incentives and opportunities to create quality content and to make this quality content more available—to lower its cost to the audience.

Paternalism lies not in governmental intervention but in refusing to treat intervention as a matter of democratic choice. Unquestioning nonintervention is paternalistic in either of two ways. Cynically, it limits people's choice to act politically, with this limitation designed to benefit systematically those people or entities that profit from nonintervention.<sup>249</sup> More sadly, unquestioning nonintervention may represent a paternalistic refusal to believe in people's capacity for democratic decisionmaking to make their media more to their liking and more conducive to their aspirations.

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<sup>247</sup> See Frank Rich, *The Idiot Chip*, N.Y. TIMES, Feb. 10, 1996, at A23. But cf. Clyde H. Farnsworth, *Chip to Block TV Gore Popular in Canada Test*, N.Y. TIMES, Feb. 28, 1996, at A2 (discussing the V-chip's popularity in Canada).

<sup>248</sup> See Lawrie Mifflin, *U.S. Mandates Educational TV for Children*, N.Y. TIMES, Aug. 9, 1996, at A16.

<sup>249</sup> To be more precise, since the government always intervenes at least to the extent of creating and enforcing a legal framework of property rights, this purported nonintervention benefits those who profit most from conventional or status quo conceptions of nonintervention.

